

9
No. 88-10-CFX
Status: GRANTED

Title: Harte-Hanks Communications, Inc., Petitioner
v.
Daniel Connaughton

Docketed:
July 1, 1988

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Levine, Lee

Counsel for respondent: Lloyd Jr., John A.

Entry	Date	Note	Proceedings and Orders
1	Jul 1 1988	G	Petition for writ of certiorari filed.
2	Jul 22 1988		Brief of respondent Daniel Connaughton in opposition filed.
3	Jul 27 1988		DISTRIBUTED. September 26, 1988
4	Jul 29 1988	X	Brief amici curiae of American Society of Newspaper Editors, et al. filed.
6	Sep 30 1988		REDISTRIBUTED. October 7, 1988
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9	Oct 17 1988		Petition GRANTED. *****
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13	Dec 1 1988		Brief of petitioner Harte-Hanks Communications filed.
14	Dec 1 1988		Brief amici curiae of Associated Press, et al. filed.
15	Dec 30 1988		Brief of respondent Daniel Connaughton filed.
16	Jan 30 1989		Reply brief of petitioner Harte-Hanks Comm. filed.
17	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 20, 1989. (3RD CASE)
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88-10

No. —

Supreme Court, U.S.

FILED

JUL 1 1988

JOSEPH F. SPANIOLO, JR.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a defamation action instituted by a candidate for public office, the First and Fourteenth Amendments obligate an appellate court to conduct an independent review of the entire factual basis for a jury's finding of actual malice—a review that examines both the subsidiary facts underlying the jury's finding of actual malice and the jury's ultimate finding of actual malice itself.

2. Whether the First and Fourteenth Amendments prohibit a judgment of liability in a defamation action instituted by a candidate for public office, based upon a finding that the defendant engaged in highly unreasonable conduct constituting an extreme departure from ordinary standards of investigation and reporting.*

* Pursuant to S. Ct. R. 28.1, Harte-Hanks Communications, Inc. states that its parent corporation is HHC Holding Company, Inc. and that it does not have an affiliate or subsidiaries other than those that are wholly owned.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. —

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner, Harte-Hanks Communications, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 28, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 842 F.2d 825 and is included in the Appendix ("App.") hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 28, 1988. A timely Petition for Rehearing and Rehearing En Banc was filed on February 11, 1988, and denied by Order

dated April 4, 1988. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Fourteenth Amendment, Section 1, United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Preliminary Statement

On August 27, 1985, a jury in Cincinnati, Ohio awarded \$5,000 in compensatory damages and \$195,000 in punitive damages in a defamation action instituted by Respondent Daniel Connaughton ("Connaughton"), a candidate for the elected office of municipal court judge, against Petitioner Harte-Hanks Communications, Inc., the publisher of the *Hamilton Journal News* (collectively, the "*Journal News*"), a daily newspaper of general circulation in Hamilton, Ohio.¹ Although Connaughton admitted to the *Journal News* the substantial truth of the allegations at issue prior to publication of the article that reported them, a divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the jury's verdict, including its finding that the article was published with actual malice.

¹ Daily circulation in 1983 was approximately 29,000. R. 1,254. References to the trial transcript are denoted herein as "R.". References to trial exhibits are denoted as "Exh.".

The Court of Appeals' decision effects a significant reformulation of both the substantive and procedural safeguards of free expression articulated by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Certiorari should be granted in this case because, if left undisturbed, the Court of Appeals' decision could profoundly alter the scope of debate in this nation on public issues and candidates for public office.²

B. Statement of Facts

1. The District Court Proceedings

The district court ordered that the jury trial in this action be bifurcated in separate proceedings on liability and damages.³ The facts presented in the liability phase of the trial may be summarized as follows:

a. The 1983 Election

Connaughton, a Hamilton attorney, announced his candidacy for the office of judge of the Hamilton Municipal Court in March 1983. R. 474. His opponent, James H. Dolan, was a popular incumbent. R. 1,080. This was Connaughton's first experience as a candidate. R. 421, 474-75.

The Municipal Court is one of Ohio's busiest, handling between 20,000 and 23,000 cases a year. R. 1,137. Hamilton, a community of over 60,000 people, has only one municipal judge.

² Simultaneously with the filing of this petition, the *Journal News* is requesting the clerk of the court possessed of the Record to certify the Record and provide for its transmission to this Court, pursuant to S. Ct. R. 19.1.

³ The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1332(a)(1).

b. *The Corruption Allegations*

For several months prior to the November 1983 election, rumors had circulated in the Hamilton area linking Billy New, the director of court services and chief administrative officer for the Hamilton Municipal Court, with alleged corrupt practices in the administration of that court. R. 359, 539-41, 585, 768. Connaughton was circulating these allegations himself in July 1983. R. 496-98; 539-41.

On September 17, 1983, Alice Thompson and her sister, Patsy Stephens, met for four hours with Connaughton, his wife and four of his campaign supporters at Connaughton's home. During this meeting, Stephens and Thompson claimed that they had participated in making payoffs to New, in return for which New "fixed" cases that were pending before the Municipal Court. R. 150-51, 356-57, 387, 680-82; Exh. 33. Stephens also claimed that some of these transactions had occurred in the presence of Judge Dolan. R. 387; Exh. 33, at 4, 9, 12-13, 17. Approximately two and one half hours of this meeting were tape recorded. R. 363.

On September 27, Connaughton filed a private criminal complaint with the Hamilton Public Safety Director, which centered upon the allegations made by Stephens and Thompson. Connaughton disclosed to the police that Stephens and Thompson were the sources of the allegations in his complaint. Shortly thereafter, Hamilton police interviewed both Stephens and Thompson, and following those interviews, New was arrested and charged with three counts of bribery. Exh. C; R. 763, 767. As a result of the allegations by Stephens and Thompson, New was subsequently indicted by a Butler County grand jury. R. 93, 643, 648; Exh. G.⁴

⁴ The grand jury's investigation exonerated Judge Dolan of any wrongdoing. R. 178, 649-50. New was later convicted and sentenced on bribery charges. R. 1,158.

The corruption allegations against New and Judge Dolan aired by Connaughton, the subsequent arrest and indictment of New, and the basis of and motivation for the allegations quickly became the major issue in the Hamilton elections. R. 588, 591, 595. Connaughton focused his campaign advertising on these allegations and charged that Judge Dolan bore ultimate responsibility for "[a]ny failure to manage the court or its employees." R. 592.

By Connaughton's own admission, Hamilton residents began to question his motives in pursuing the corruption allegations against New and Judge Dolan. R. 485-86; Exh. D. In a letter to the editor published in the October 20 edition of the *Journal News*, Connaughton acknowledged that "a charge of 'dirty politics' has been levied against me by some members of the community," but denied that "my actions were purely political." R. 485; Exh. D.

On October 27, Jim Blount, the editorial director of the *Journal News*, along with reporter Pam Long, conducted a tape-recorded interview of Thompson. R. 72, 74-75; Exhs. J, L. During the interview, Thompson told the *Journal News* that Connaughton had offered her and her sister employment after the election, a Florida vacation, and a victory dinner at Cincinnati's expensive Maisonette Restaurant in appreciation for their help. Ex. J., at 24-29, 39. She also claimed that Connaughton had told Thompson and Stephens that he intended to play the tape of the September 17 meeting to Judge Dolan and force him to resign. Exh. J, at 22-23; R. 731. Thompson said she was upset because she had been publicly implicated in the investigation of New, despite Connaughton's promise that she would remain anonymous. R. 77-78, 93; Exh. I, at 30, 39-40, 53. In her opinion, Connaughton had "tricked" her. Exh. J, at 39-40, 55; R. 729. Thompson told Blount and Long that she had provided the same information to the police, an assertion that was confirmed at trial by police officer James Schmitz. Exh. J, at 51-54; R. 766.

c. *The Journal News Investigation*

On October 31, Long and Blount interviewed Connaughton about Thompson's claims. R. 91-92, 455-56, 462-63. The interview was tape recorded and later transcribed. R. 101-02, 131, 458, 463, 605; Exh. I. During the interview, Connaughton initially denied promising jobs or a vacation trip to Thompson and Stephens, but then contradicted himself and *admitted* the factual basis of Thompson's allegations. Exh. I, at 14-17. Connaughton conceded that, during the September 17 meeting at his home, his wife had discussed with Stephens that "maybe [Stephens] would help out and participate in the operation of [a]—whatever you want to call it—deli shop or gourmet ice cream shop" that his wife hoped to open and that "the offer may have been extended to [Thompson] in that fashion, that she could work there." Exh. I, at 15. Connaughton also confirmed that the possibility of a Florida trip and a post-election victory dinner at the Maissonette Restaurant for Thompson and Stephens were discussed at the meeting. Exh. I, at 27-28.

Moreover, Connaughton conceded during the interview that he had discussed with Thompson her wish for anonymity and that he "told her it would be my intention and hope that she could remain anonymous." Exh. I, at 13. He added that "I imagine she feels betrayed . . . [b]ecause she's not anonymous, and she probably felt that my representation, that maybe she could remain anonymous, had been a breach of trust to her." Exh. I, at 14. Finally, Connaughton confirmed that he had said during the September 17 meeting that he would like to play the tape of the meeting for Judge Dolan and New and that "after they hear [the tape] they ought to just resign and quit, or something. . . ." Exh. I, at 13.⁵

⁵ The newspaper staff did not listen to a tape recording that Connaughton had prepared of the September 17 meeting because

The *Journal News* also interviewed Connaughton supporters present at the September 17 meeting, who denied hearing the statements alleged by Thompson to have been made by Connaughton. R. 114-16. However, these participants did not hear all the conversations that occurred that night between Connaughton, Thompson and Stephens. R. 364-65, 437, 683-84. The *Journal News* did not interview Stephens because Blount and Long understood that Connaughton would arrange to have her contact the newspaper, and she did not do so. R. 106, 606-07, 776.

The *Journal News* then worked to confirm Thompson's allegations concerning the Connaughton meetings. Blount contacted Butler County prosecutor John Holcomb, who assured Blount that, based on Holcomb's experience with Thompson, she was a credible witness and, in fact, was more credible than her sister. R. 93, 600, 644-47. Moreover, Blount knew that Thompson was deemed sufficiently credible by Connaughton to convince him to file his September 27 criminal complaint based entirely on Thompson's allegations and those of her sister, and by the county prosecutor and police to prompt the subsequent indictment of New. R. 487-89, 504; Exhs. D, I, at 10.

d. *The November 1 Article and Its Aftermath*

Based upon Connaughton's admissions as to the factual basis for Thompson's allegations; Thompson's apparent credibility; and the obvious public importance of Thompson's claims, *Journal News* editors decided that the paper should report the story. R. 93, 128-30, 224-25, 333, 614, 639. Blount wanted the article published by November

both Connaughton and Thompson confirmed that the tape did not record the entire meeting, because they and police investigators told the newspaper that the tape did not contain the statements alleged by Thompson to have been made by Connaughton, and because police investigators and the prosecutor had told Blount that the recording was "junk." R. 80-82, 86, 221-22, 363, 505-07, 510, 605-06; Exh. I, at 8; Exh. J, at 22, 24-25.

1 in accordance with the *Journal News*' guidelines prohibiting the publication of new allegations regarding candidates for public office within one week of an election. R. 585-86, 617. Accordingly, Blount asked the *Journal News*' attorney, James Irwin, to review the article before publication and advise the newspaper as to its legal rights and obligations. R. 795-97. After reading the article and discussing with the *Journal News* staff the investigation that the newspaper had conducted, Irwin concluded that the newspaper was legally entitled to publish. R. 797. Irwin, Blount and Long thought that Thompson's allegations were believable, and that the substance of those allegations had been confirmed by Connaughton himself, "leaving only a question of interpretation [of Connaughton's comments to Thompson and Stephens] for the readers of the article." R. 802.⁶

The article, which is set out in full as an appendix to Judge Guy's dissent from the Court of Appeals' decision, App. 68a-75a, appeared in the November 1 edition of the *Journal News*, Joint Exh. I; R. 98. It accurately reported Thompson's claims that Connaughton had "offered her and her sister jobs and a trip to Florida in appreciation" for their help, but added that Connaughton "denied any wrongdoing and said Thompson misinterpreted [his] comments." Joint Exh. I. The article accurately detailed Thompson's allegations, followed by

⁶ Connaughton's principal contention on appeal was that Irwin had "admitted" in deposition testimony that "I was told [during his pre-publication meeting with the *Journal News*] that Dan Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips." R. 819. Significantly, the Court of Appeals declined to interpret that statement in the strained manner advocated by Connaughton. Indeed, Irwin repeatedly explained at trial, consistent with the testimony of the others present at the pre-publication meeting, that it was the *Journal News*' understanding that Connaughton had contended that Thompson "misinterpreted his comments and discussions," not that Thompson had in fact misinterpreted Connaughton's statement, as Connaughton apparently would maintain. R. 818-23.

Connaughton's response to each allegation. In addition, the article reported that the Connaughton supporters who were present at the September 17 meeting insisted that "no promises were made" to Thompson and Stephens. Joint Exh. I.

On November 3, Connaughton held a press conference to address the issues raised by the article. On the following day, the *Journal News* published a detailed article reporting Connaughton's statements at the press conference. R. 615; Exh. F.

On November 6, the *Journal News* published an editorial endorsement of Dolan. Exh. W. Dolan defeated Connaughton decisively in the November 8 election by a margin of 60 percent to 40 percent; Dolan carried every precinct but one. R. 627.

2. The Verdict

The first phase of the bifurcated trial ended with a verdict on liability in favor of Connaughton. The verdict form, reproduced at App. 89a, asked the jury three questions regarding the allegedly defamatory article: (1) was "the publication in question . . . defamatory toward the plaintiff?," (2) was it "false?," and (3) was it "published with actual malice?" The jury answered all three questions affirmatively. *Id.* The second phase of the trial concluded with a jury award to Connaughton of \$5,000 in compensatory damages and \$195,000 in punitive damages. R. 1334-35. The compensatory award reflected the only specific evidence of quantifiable financial loss introduced by Connaughton, i.e., that his attorneys had incurred approximately \$5,000 in expenses in prosecuting the case. The district court subsequently denied the *Journal News*' motion for judgment notwithstanding the verdict and entered judgment on the jury's verdict. App. 82a-83a.

3. The Decision Below

On January 28, 1988, a divided panel of the Court of Appeals affirmed the trial court's judgment. App. 1a-75a, 85a-86a. The panel majority recognized that, because Connaughton is a public figure, the court had a constitutional duty to conduct an independent examination of the record supporting the jury's finding of actual malice. App. 30a-33a (citing *Bose Corp. v. Consumers Union*, 466 U.S. at 492). The majority reasoned, however, that the obligation of independent review applies only to the "ultimate conclusion of clear and convincing proof of actual malice" and not to "preliminary, operative, or subsidiary factual determinations," which are governed by the "clearly erroneous" standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure. App. 33a.

As a result, the majority reviewed the entire record, but only "to determine if the jury's findings were clearly erroneous." App. 4a. In conducting that review, the majority consciously disregarded all record evidence that supported the *Journal News*' position, including evidence that did not require determinations of credibility by the trier of fact. App. 19a. For example, the majority dismissed Connaughton's admissions of the substantial truth of Thompson's allegations "as nothing more than conjecture elicited by structured questions calculated to evoke speculation" and therefore ignored them for purposes of reviewing the jury's finding of actual malice. App. 30a. Instead, the majority embarked on a search for any evidence that could conceivably support the jury's finding of actual malice⁷ and intentionally drew all possible adverse

⁷ The majority noted that the *Journal News* is in the business of selling newspapers, that it competes for readership with the *Cincinnati Enquirer*, App. 5a, that Blount had reported certain criticism of the *Enquirer* in a previous column, App. 13a n.2, that the *Journal News* had endorsed Dolan's candidacy, App. 21a, and that the *Enquirer* had published articles critical of Dolan, App. 9a. From these facts, the court proceeded to draw the inference that

inferences from the record evidence to support the jury's verdict.⁸

Based upon this construction of its obligation of independent review under *Bose*, the panel majority proceeded to infer the existence of eleven "preliminary" or "subsidiary" findings of fact that a jury *might* have made, but undertook no independent assessment of the

"the jury could have found that the *Journal* was motivated to publish the controversial article by its effort to establish its pre-eminence in reporting political news in order to further its competitive position vis-a-vis the *Enquirer* in the greater Hamilton County geographical area through the advancement of Dolan's candidacy." App. 41a.

⁸ The majority's opinion also contains several assertions of "fact" that are simply not reflected in the trial record and others that are directly contrary to undisputed record evidence. For example, the majority asserts that the *Journal News* had accorded Dolan "consistent favorable coverage . . . throughout the campaign," App. 12a; that the *Cincinnati Enquirer* "was threatening [the *Journal News*'] circulation," App. 5a; that Blount and Dolan shared a "confidential personal relationship," App. 35a; and that the *Journal News* "had deliberately avoided interviewing" Stephens, App. 36a, despite the absence of *any* record evidence in support of these claims. In addition, the majority asserted that Connaughton "at no time [prior to his contact with Thompson and Stephens] alluded to the unsupported rumors of corruption associated with the Hamilton Municipal Court," App. 6a, despite Connaughton's admission at trial that he had claimed to have incriminating evidence against Dolan and New months before he became aware of the allegations of Stephens and Thompson, R. 496-98, 539-41; that "Blount knew that he had not conducted *any* investigation of Thompson's credibility within the context of the Connaughton accusations," App. 20a (emphasis added), despite uncontradicted record evidence that the *Journal News* had assigned at least seven reporters to investigate Thompson's accusations, R. 233, 280, had inquired with the local prosecutor regarding her credibility, R. 93, 600, 644-47, and had asked the newspaper's attorney to confirm information provided by Thompson, R. 793-94; and that a *Cincinnati Enquirer* exposé on Judge Dolan's court was "by Blount's own admission . . . the most significant story impacting the Connaughton-Dolan campaign," App. 35a, although Blount had specifically testified to the contrary, R. 59.

plausibility of those findings. App. 35a-36a.⁹ For example, the majority assumed that the jury had found that

⁹ The so-called "subsidiary findings" that the Court of Appeals imputed to the jury were as follows:

(1) that the *Journal* was singularly biased in favor of Dolon [sic] and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the *Journal* Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolon [sic] from the *Journal* as compared with the equally consistent unfavorable news coverage afforded Connaughton; (2) that the *Journal* was engaged in a bitter rivalry with the *Cincinnati Enquirer* for domination of the greater Hamilton circulation market as evidenced by Blount's vituperous public statements and criticism of the *Enquirer*; (3) that the *Enquirer's* initial exposé of the questionable operation of the Dolan court was a high profile news attraction of great public interest and notoriety that had 'scooped' the *Journal* and by Blount's own admission was the most significant story impacting the Connaughton-Dolan campaign; (4) that by discrediting Connaughton the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area; (5) that Thompson's emotional instability coupled with her obviously vindictive and antagonistic attitudes toward Connaughton as displayed during an interview on October 27, 1983, arranged by Billy New's defense attorney, afforded the *Journal* an ideal vehicle to accomplish its objectives; (6) that the *Journal* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition; (7) that every witness interviewed by *Journal* reporters discredited Thompson's accusations; (8) that the *Journal* intentionally avoided interviewing Stephens between October 27, 1983, the date of its initial meeting with Thompson, and November 1, 1983 when it printed its first story even though it knew that Stephens could either credit or discredit Thompson's statements; (9) that the *Journal* knew that publication of Thompson's allegations charging Connaughton with unethical conduct and criminal extortion and her other equally damaging statements would completely discredit and irreparably damage Connaughton personally, professionally and politically; (10) that its pre-publication legal review was a sham; [and] (11) that the *Journal* timed the release of the initial story so as

the *Journal News* was remiss in not interviewing Patsy Stephens before publishing, App. 36a, and deliberately accorded no weight to the *Journal News's* evidence that the need to interview Stephens was obviated by Connaughton's pre-publication admission of the substantial truth of Thompson's account, App. 19a. Similarly, the majority inferred a jury finding that the newspaper knew Thompson to be an unreliable source, App. 36a, in disregard of the undisputed record evidence that Connaughton's pre-publication interview with the *Journal News* "confirmed the substance of [Ms. Thompson's] factual allegations," App. 50a (Guy, J., dissenting), and that the *Journal News* was told by the local prosecutor that Thompson was credible, R. 93, 600, 644-47.

Finally, the majority characterized its eleven "subsidiary" findings as "credibility" assessments that may have been made by the jury and therefore concluded that those findings were necessarily exempt from appellate review, except under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. The majority then undertook to perform an "independent review" of these eleven "subsidiary" findings only to determine whether, when taken together, they supported the jury's "ultimate" finding of actual malice. In so doing, although the majority referenced the definition of actual malice adopted in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), see App. 26a ("sufficient proof must support the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication"), it concluded that the "ultimate" finding of actual malice in this case was supported by the eleven "subsidiary" findings that the jury *could have* made, because

to accomodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*.

App. 35a-36a.

those findings “demonstrated highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” App. 38a, 41a, 43a (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.)).

In a lengthy dissent, Judge Guy identified two “glaring omissions” in the majority’s analysis. App. 49a. First, Judge Guy noted that the majority had declined to discuss “the exact language of the allegedly defamatory article,” App. 49a, which simply “presented two versions of a discussion which admittedly took place and allowed the readers to draw their own conclusions as to which version was more accurate,” App. 59a. Second, the dissent took issue with the majority’s “cavalier” dismissal of Connaughton’s undisputed statements to the *Journal News* in which he “essentially confirmed the substance of the factual allegations” that subsequently appeared in the article. App. 50a. Because “[i]t is undisputed that [Connaughton] made the statements,” Judge Guy observed, a fair reading of them precluded a finding of actual malice “as a matter of law.” App. 62a. Accordingly, Judge Guy rejected the majority’s “extremely narrow construction,” App. 62a, of the obligation of independent appellate review enunciated in *New York Times Co. v. Sullivan*, 376 U.S. at 285, and *Bose Corp. v. Consumers Union*, 466 U.S. at 514, but concluded that, “even under the narrow scope of appellate review utilized by the majority,” the record failed to support a finding of actual malice, App. 50a (Guy, J., dissenting). Judge Guy then reviewed each of the “subsidiary” findings inferred by the majority and concluded that none of them—considered alone or cumulatively—established actual malice by clear and convincing evidence. App. 63a-66a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Embraced an Improper Standard of Appellate Review

This Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), that an appellate court bears a constitutional obligation to “make an independent examination of the whole record” to ensure that a judgment rendered in favor of a public official in a defamation action “does not constitute a forbidden intrusion on the field of free expression.” Two decades later, the Court reaffirmed this principle in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984), and held that “the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times*.” Rather, the Court held in *Bose* that appellate courts must engage in a “*de novo* review,” *id.* at 508 n.27, and “independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice,’” *id.* at 511.

Despite the “constitutional obligation” articulated in *New York Times*, 376 U.S. at 285, and *Bose*, 466 U.S. at 514, the Court of Appeals has held in this case that an appellate court’s “*de novo* review” is limited to the so-called “ultimate” finding of actual malice and does not extend to any findings of “subsidiary” facts or to any inferences from those facts that may have been drawn by the jury. App. 33a. In so holding, the Court of Appeals embraced the lone dissenting opinion in *Tavoulareas v. Piro*, 817 F.2d 762, 809 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. denied*, 108 S. Ct. 200 (1987), assailed the opinion of the *Tavoulareas* majority—which expressly declined to adopt the reasoning of the dissenting opinion, and articulated a doctrine in di-

rect conflict with the California Supreme Court's holding in *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987), as well as with the practice of at least two other federal circuits.

Indeed, the Court of Appeals' decision renders the obligation of independent review articulated in *New York Times* and *Bose* a nullity and, as a result, permits a jury verdict penalizing constitutionally protected expression to stand. In this era when "evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff in a defamation case," *Ollman v. Evans*, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985), this Court should grant certiorari in this case to make clear the contours of the requirement of independent appellate review, which after all, "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution," *Bose Corp. v. Consumers Union*, 466 U.S. at 510-11.

A. The Court of Appeals' Decision Conflicts With Those of Other Federal and State Appellate Courts

Prior to the Court of Appeals' decision in this case, other appellate courts have considered, but refused to endorse, the two-tiered construction of the requirement of independent appellate review adopted below. For example, in *Tavoulareas v. Piro*, 817 F.2d 762, 777 (D.C. Cir.), *cert. denied*, 108 S. Ct. 200 (1987), the District of Columbia Circuit declined to "tackle the knotty constitutional issue regarding what constitutes independent review under *Bose*,"¹⁰ but recognized that, at a mini-

¹⁰ The United States Court of Appeals for the Seventh Circuit appears to share the view that the proper scope of the independent

mum, the obligation includes a duty to scrutinize "the inferences to be drawn from evidence of actual malice far more rigorously than [the] ordinary judgment n.o.v. standard would permit." *Id.* at 804 (Wald, C.J., concurring). The court in *Tavoulareas*, unlike the Sixth Circuit in this case, carefully examined *both* the record evidence supporting the jury's finding of actual malice *and* the evidence negating such a finding, in order to determine whether *each* possible inference of actual malice drawn by the jury was reasonably grounded in the record. *See id.* at 789-98.

The *Tavoulareas* court held that "actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith." *Tavoulareas v. Piro*, 817 F.2d at 789. The panel majority in this case, in contrast, rebuked the *Tavoulareas* court for affording "no recognition" to "rudimentary principles applicable to appellate review of summary dispositions," for evaluating "both the credibility and weight of the evidence," and for denying "the plaintiff his entitlement to have the evidence along with all inferences reasonably drawn therefrom to be viewed in the light most favorable to the plaintiff." App. 33a n.11. "In sum," the panel majority concluded, "the *en banc* court [in *Tavoulareas*] appears to have intruded into the original jurisdiction of a trial court jury." App. 34a n.11.¹¹

review requirement is unclear. *See Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) (court declined to "tackle the knotty constitutional issue regarding what constitutes independent review under *Bose*" [quoting *Tavoulareas*], but proceeded to perform what it characterized as a "wide ranging appellate review," and concluded that "both deferential and *de novo* review yield the same result").

¹¹ The panel majority elected instead to be guided by Judge MacKinnon's panel opinion in *Tavoulareas*, which was vacated by

Similarly, the California Supreme Court in *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987), has expressly rejected the reading of *New York Times* and *Bose* adopted by the Sixth Circuit. In *McCoy*, the unanimous court held that, under *New York Times* and *Bose*, an appellate court "is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry." 42 Cal. 3d at 846, 727 P.2d at 718, 231 Cal. Rptr. at 525. Rather, the court concluded, an appellate court may "substitute its own inferences on the issue of actual malice for those drawn by the trier of fact" and "must independently determine the constitutional import of any particular witness's testimony as it relates to the question of actual malice." *Id.* The court

the *en banc* court in that case. Specifically, the panel majority in this case endorsed Judge MacKinnon's view that an appellate court may not apply its "independent judgment to each separate fact determination that forms the basis for the ultimate conclusion of 'actual malice,'" but "rather only to the ultimate conclusion of clear and convincing proof of 'actual malice.'" *Tavoulareas v. Piro*, 759 F.2d 90, 107 (D.C. Cir. 1985) (MacKinnon, J.), *vacated en banc*, 763 F.2d 1472 (D.C. Cir. 1986); *cf. Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (while "appellate court must independently review the record," factfinder "retains its traditional role in the determination of facts, such as the credibility of witnesses"); *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985) ("We limit [our review of the record] to the ultimate factual finding of the constitutionally mandated actual malice element . . . we decline to undertake to review the credibility findings of the district court and the subsidiary factual findings supporting the ultimate determination regarding actual malice."), *cert. denied*, 475 U.S. 1119 (1986); *Starkins v. Bateman*, 150 Ariz. App. 537, 543, 724 P.2d 1206, 1212 (1986) ("An appellate court is not equipped to [undertake a *de novo* review of underlying facts which support the verdict] effectively, and to do so would entirely displace the function of the jury in defamation cases.").

also observed that "it is constitutionally inadequate to review only those portions of the record that support the verdict." *Id.*¹²

In the wake of the Sixth Circuit's analysis in the instant case, there is a palpable conflict in the lower courts concerning the scope of the constitutional obligation of independent appellate review envisioned by *New York Times* and *Bose*. Accordingly, certiorari should be granted by this Court to resolve this important issue of constitutional jurisprudence.

¹² Similarly, in *Tavoulareas*, Chief Judge Wald and Judge Wright expressly concluded that the First Amendment does not permit an appellate court reviewing a finding of actual malice to defer to a jury's "presumed factual findings" or to the factual "inferences that the jury may be presumed to have drawn, even though those inferences are 'permissible' ones under the traditional judgment n.o.v. standard." *Tavoulareas v. Piro*, 817 F.2d at 805 (Wald, C.J., concurring). Instead, the obligation of independent review requires appellate judges to reexamine the entire factual record on which a finding of actual malice is based, as well as those "inferences that the jury may be presumed to have drawn from the facts, . . . to determine for [them]selves whether the facts on which the jury relied constitute clear and convincing evidence of actual malice." *Id.* at 805; *accord Tavoulareas v. Piro*, 759 F.2d 90, 147 (D.C. Cir. 1985) (Wright, J., dissenting) (appellate court may reject, "as part of its independent inquiry," any inference "drawn by the [trier of fact] that was freighted with actual malice implications"), *vacated en banc*, 763 F.2d 1472 (1986). If "the *Bose* Court meant what it said," such a rigorous review of the record is essential. *Id.* at 149; *cf. Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985) (court recognized its duty to conduct independent examination of the record and concluded evidence of actual malice was clearly inadequate); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088-90 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (fulfilling the "affirmative duty of a reviewing court" to perform a *de novo* review, the court conducted an independent review of the record and concluded that there was insufficient evidence of actual malice).

B. The Court of Appeals' Reading of *Bose* Renders Meaningless the Requirement of Independent Review

The Court of Appeals' notion of independent review requires an appellate court to draw all inferences from the facts adduced at trial—no matter how unfounded or speculative—in favor of the plaintiff, to ignore even undisputed evidence supporting the defendant, to “cumulate” all conceivable adverse inferences in support of the jury’s verdict, and only then to consider whether actual malice has been clearly and convincingly demonstrated. “This approach renders the independent appellate review promised by *Bose* a mirage. Independent review of the record devolves into review of the pool of pre-selected inferences that cut against the defendant.” *Tavoulareas v. Piro*, 759 F.2d at 147 (Wright, J., dissenting). By the time the appellate court begins its “independent” review of the evidence, “[t]here is nothing left for an appellate court to review: the conclusion that the defendants acted with actual malice follows inevitably.” *Tavoulareas v. Piro*, 817 F.2d at 805 (Wald, C.J., concurring); accord *McCoy v. Hearst Corp.*, 42 Cal. 3d at 846, 727 P.2d at 718, 231 Cal. Rptr. at 525 (quoting *Tavoulareas v. Piro*, 759 F.2d at 147 (Wright, J., dissenting)) (“[T]he constitutional responsibility of independent review encompasses far more than [an] exercise in ritualistic inference granting.”).

To hold, as did the Court of Appeals, that judges have no choice but to draw those inferences that are most adverse to the defendant is to predetermine in favor of the plaintiff the resolution of the ultimate issue of whether the defendant published with “actual malice.” See *Garrison v. Louisiana*, 379 U.S. 64, 81 (1964) (Douglas, J., concurring) (“If malice is all that is needed, inferences from facts as found by the jury will easily oblige.”). This Court has expressly recognized that “the stakes” in the resolution of the actual malice issue are “too great to entrust them finally to the judgment of the trier of fact.” *Bose Corp. v. Consumers Union*, 466

U.S. at 501 n.17.¹³ Because just such an abdication of the constitutional duty of the appellate courts is virtually mandated by the holding of the Court of Appeals, this Court should take this opportunity to correct the Sixth Circuit’s erroneous interpretation of *New York Times* and *Bose*.

C. An Independent Examination of the Record in this Case Mandates Reversal of the Jury’s Finding of Actual Malice

Had the Court of Appeals properly exercised its constitutional obligation to conduct an independent review of the entire record in this case, it would have been compelled to conclude, as did Judge Guy in dissent, that “the plaintiff could not have made the requisite showing of actual malice at trial under any standard of proof, let alone the rigorous ‘clear and convincing evidence’ standard which applies in this case.” App. 50a (Guy, J., dissenting).

An independent review of the jury’s finding of actual malice requires reference to only one piece of evidence, the undisputed text of the *Journal News*’ pre-publication interview with Connaughton. In that interview, Connaughton “confirmed the factual basis of Ms. Thompson’s allegations,” App. 58a, and thereby “provided ample basis for the *Journal News* to conclude that Ms. Thompson’s allegations were substantially true,” App. 60a. An evalu-

¹³ Indeed, as Judge Wright observed, in *Bose* this Court refused to defer to inferences expressly drawn by the trier of fact from a witness’ testimony. In *Bose*,

the decision turned on the inference to be drawn from the finding that the witness was not telling the truth in failing to understand the difference between two phrases: the Supreme Court rejected the inference, drawn by the trier of fact, that the witness recognized the difference at the time of publication, and the Court drew its own inference that the testimony was part of the witness’ “capacity for rationalization.”

Tavoulareas v. Piro, 759 F.2d at 147 (Wright, J., dissenting) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. at 512).

ation of this evidence, as mandated by *Bose*, requires no weighing of the credibility of conflicting witnesses or of the "reasonableness and probability [to be assigned to] their testimony." App. 27a.¹⁴

¹⁴ The Court of Appeals' standard of review, however, required it to ignore this undisputed evidence in favor of an assortment of "findings" that the jury "presumably" could have made. App. 37a. Yet, as Judge Guy observed, "[e]ven if these speculative 'subsidiary' factual findings were the only evidence before the court," they could not "constitute 'clear and convincing evidence' of a reckless disregard for the truth." App. 61a. First, by relying principally on presumed evidence of the *Journal News*' ill will or bad motive in justifying the jury's verdict, the Court of Appeals improperly "equated the term 'actual malice' with 'animosity' or 'antipathy' rather than its technical legal definition." App. 64a; see *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 881 (1988) (while "a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures"); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 281-82 (1974) ("ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard") (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971)). Second, even if, as the Court of Appeals concluded, the jury could have reasonably believed that the *Journal News* was remiss in not interviewing Stephens before publishing, such a "failure to verify" a source's information is insufficient to establish actual malice. See *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (failure of defendant to verify source's allegations against plaintiff "fall[s] short of proving . . . reckless disregard"). Third, the Court of Appeals concluded that actual malice could be inferred from the *Journal News*' supposed knowledge that Thompson was an unreliable source. App. 35a, 36a. Yet, under demonstrably less convincing circumstances in which an allegedly unreliable source was only partially corroborated (and not out of the mouth of the plaintiff himself), this Court has squarely held that an inference of actual malice could not be drawn by a jury. See *St. Amant v. Thompson*, 390 U.S. at 733 (reliance on source locked in fierce union struggle with allies of plaintiff did not permit inference of actual malice where defendant had "verified other aspects" of source's information).

Perhaps the most disquieting aspect of the Court of Appeals' analysis is its requirement that appellate courts draw a necessary

An independent review of the whole record in this case reveals that the *Journal News* was simply "performing its wholly legitimate function as a community newspaper" when it reported Thompson's statements—the latest in an ongoing exchange of allegations in a highly charged election campaign. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). The *Journal News* article constituted a concededly accurate report of Thompson's accusations concerning Connaughton's fitness for the public office he sought. Indeed, the article recited not only an accurate account of Thompson's description of the events at issue, but fully reported Connaughton's version of them as well. Such a balanced report in the context of a political campaign falls squarely within the protections of the First Amendment. As this Court recognized in *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. at 14, "[t]o permit the infliction of financial liability upon the petitioners for publishing" accurately what both sides of a public dispute had to say, especially without the considered review of this Court under the constitutionally mandated standard, "would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments."

inference of actual malice from a newspaper's competition for circulation with another publication, and its endorsement of a candidate for public office. Indeed, according to the peculiar logic thrust upon the Court of Appeals by its erroneous construction of its obligation of independent review, actual malice may be presumed in *any* defamation action against a newspaper since it may safely be assumed that "all newspapers seek to increase their market share by publishing newsworthy stories," App. 64a (Guy, J., dissenting), and that most newspapers endorse and comment upon the qualifications of political candidates. Such a result is manifestly inconsistent with *New York Times* and *Bose* and is at odds with fundamental precepts of freedom of expression embodied in the First Amendment. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (First Amendment relies on journalistic integrity and competition among newspapers for "a sufficient number of readers—and hence advertisers—to assure financial success" as a check on press irresponsibility) (citation omitted).

II. The Court of Appeals Has Reformulated the Definition of Actual Malice Established by This Court

In *New York Times*, this Court held that the First Amendment prohibits a public official from recovering damages in a defamation action unless the plaintiff proves that the statements at issue were published with "actual malice," i.e., "knowledge" of their falsity or "reckless disregard" for the truth. 376 U.S. at 280. Since *New York Times*, the Court has declared in no uncertain terms that "reckless disregard" speaks to the defendant's *scienter* or state of mind at the time of publication. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), for example, the Court held that "reckless disregard" is demonstrated only when false statements have been published with "at least a high degree of awareness of their probable falsity." *Id.* at 74 (emphasis added). Stated differently, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [its] publication." *St. Amant v. Thompson*, 390 U.S. at 731 (emphasis added).¹⁵

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), a plurality of the Court advocated a different

¹⁵ Accord *Bose Corp. v. Consumers Union*, 466 U.S. at 512 n.30 ("The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."); *Herbert v. Lando*, 441 U.S. 153, 172 (1979) (defamation plaintiff must prove "awareness of probable falsehood"); *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971) (holding actual malice was not established due to lack of proof that "defendant in fact entertained serious doubts as to the truth of [its] publication") (quoting *St. Amant v. Thompson*, 390 U.S. at 731); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (no actual malice in absence of "the 'high degree of awareness of probable falsity demanded by *New York Times*'") (quoting *Garrison v. Louisiana*, 379 U.S. at 74).

formula, intended for use only in cases involving public figures, *not* public officials or candidates for public office, such as Connaughton. The standard proposed by the *Butts* plurality would disregard the defendant's state of mind and instead require a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" in suits instituted by "public figures." 388 U.S. at 155 (plurality opinion of Harlan, J.). This journalistic malpractice standard was expressly rejected by a majority of this Court in *Butts*, which instead applied the *scienter* requirement of *New York Times* to suits instituted by public figures as well as public officials.¹⁶ In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974), the Court reaffirmed the *Butts* majority's extension of the *scienter* requirement to actions involving allegedly defamatory statements about public figures.¹⁷

¹⁶ The majority of the Court that extended the *scienter* requirement to actions brought by public figures included Chief Justice Warren, who concurred in the results reached by the plurality but expressly did so by application of the actual malice standard, 388 U.S. at 162 (Warren, C.J., concurring in judgment) ("While I agree with the results announced by Mr. Justice Harlan in both of these cases, I find myself in disagreement with his stated reasons for reaching those results. Our difference stems from his departure from the teaching of *New York Times Co. v. Sullivan*"), Justices Black and Douglas, who consented to the application of the actual malice standard while reiterating their views that the First Amendment should be an absolute bar to libel actions, *id.* at 170 (Black, J., concurring in part), and Justices Brennan and White, who also adopted the "actual malice" standard, *id.* at 172-73 (Brennan, J., concurring in part). See Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 Sup. Ct. Rev. 267, 275 (section discussing positions of individual justices entitled "You Can't Tell the Players Without A Score Card").

¹⁷ See *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 12 (1970) (noting different nature of proof required under standards enunciated by *Butts* plurality and in *New York Times*).

In this case, the Court of Appeals incorrectly equated "actual malice" with the journalistic malpractice standard proposed by a plurality of the Court in *Butts*, but rejected by the Court's majority in that very case as well as in *Gertz*. See App. 38a-41a. The Court of Appeals first concluded that, by publishing the article at issue "based solely upon the Thompson statements" and without "substantial independent support," the *Journal News* "ignored elementary precautions and demonstrated highly unreasonable conduct which constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." App. 40a. Then, based on this application of the journalistic malpractice test, the Court of Appeals concluded that this "ultimate" finding "provided clear and convincing proof of 'actual malice.'" App. 43a.

The Court of Appeals' resurrection of the *Butts* plurality's standard of "highly unreasonable" conduct is squarely at odds with a litany of lower court decisions that have insisted upon a strict application of the *scienter* requirement articulated by this Court.¹⁸ Recently, how-

¹⁸ See, e.g., *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d at 1070 ("Despite a confusing use of the words 'malice' and 'reckless,' 'actual malice' cannot be proven by showing only ill will or negligence, or even gross negligence, on the part of the defendant. . . . Instead, the inquiry focuses on the actual state of mind of the defendants.") (emphasis added); *Woods v. Evansville Press Co.*, 791 F.2d 480, 489 (7th Cir. 1986) ("journalism skills are not on trial in this case. The central issue is not whether the . . . column measured up to the highest standards of reporting or even to a reasonable reporting standard, but whether the defendants published the column with actual malice. . . ."); *Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976) ("Whereas the common law [libel] standard focuse[d] on the defendant's attitude toward the plaintiff, 'actual malice' concentrates on the defendant's attitude toward the truth or falsity of the material published."); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 564 (S.D.N.Y. 1984) ("actual malice rests on the defendant's state of mind at the time of publication") (emphasis added).

ever, some courts have demonstrated a disturbing reluctance to invoke this constitutional safeguard. Last year, for example, the Montana Supreme Court declared a jury instruction defining "reckless disregard" in language repeated almost verbatim from *St. Amant v. Thompson*, 390 U.S. at 731, "fatally defective," because such an instruction could "encourage[] irresponsible journalism." *Sible v. Lee Enters., Inc.*, 729 P.2d 1271, 1274 (Mont. 1986), cert. denied, 107 S. Ct. 3242 (1987). The Montana Supreme Court admonished the trial court that its instruction was erroneous because "[a] jury could have found that [the defendant] was reckless 'in failing to investigate' but nevertheless [find] there was no malice because [the defendant] did not entertain serious doubts about the actual truth of the statement." *Id.*

The Connecticut appellate courts have also embraced the *Butts* plurality's journalistic malpractice standard. See, e.g., *Miles v. Perry*, 529 A.2d 199, 203 (Conn. App. 1987); *Brown v. K.N.D. Corp.*, 509 A.2d 533, 537 (Conn. App. 1986), rev'd on other grounds, 529 A.2d 1292 (Conn. 1987). "A public figure," observed the court in *Miles v. Perry*, "as opposed to a public official, can recover damages for a defamatory falsehood upon a showing of 'highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.'" 529 A.2d at 203-04 n.6 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. at 155 (plurality opinion of Harlan, J.)).

Under the journalistic malpractice standard adopted by these courts and by the Court of Appeals in the instant case, a newspaper may be penalized for reporting on the conduct of those who hold or seek public office if the newspaper's conduct does not comport with a particular jury's view of what constitutes proper "investigation and reporting." App. 41a. Moreover, under the Court of

Appeals' approach, even the most routine and accepted journalistic practices, such as a newspaper's endorsement of a political candidate, or its "competition for circulation" with a rival newspaper, may subject it to a large damage award. App. 22a. By discarding the constitutional protection afforded expression that is erroneous but honestly believed, where the speaker has engaged in conduct deemed "highly unreasonable" by a jury, the Court of Appeals has threatened the essential purpose of *New York Times*: to preserve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270.

As this Court unanimously declared in *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1987), "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that" he will be subject to liability for "utterances honestly believed," since such expression plainly contributes "to the free interchange of ideas and the ascertainment of truth" that is the lifeblood of our democratic system. *Id.* at 881 (quoting *Garrison v. Louisiana*, 379 U.S. at 73). Because the Court of Appeals, as well as other courts, have ignored this admonition in favor of a standard of care repeatedly rejected by this Court, certiorari should be granted in the instant case so that this Court can reaffirm the constitutionally mandated definition of "actual malice."

CONCLUSION

This Court has long recognized that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for [public] office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).¹⁹

¹⁹ The Court stated in *New York Times*:

[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their

If the judgment in this case is allowed to stand, a daily newspaper will be compelled to pay a \$200,000 penalty, including \$195,000 in punitive damages, because it accurately reported to its readers a newsworthy controversy regarding the political campaign of a candidate for public office. This is precisely the sort of "[p]ublic discussion about the qualifications of a candidate for elective office" that presents the most compelling occasion for application of the principles of *New York Times Co. v. Sullivan*. See *Ocala Star-Banner v. Damron*, 401 U.S. 295, 300-01 (1971).

The Court of Appeals has succeeded in reaching this result only by discarding this Court's directive that appellate judges undertake an independent review of the entire record supporting a jury's determination of actual malice. *Bose Corp. v. Consumers Union*, 466 U.S. at 511, and its mandate that actual malice be adjudicated under a subjective test of the defendant's "awareness of [the] probable falsity" of its publication, *Garrison v. Louisiana*, 379 U.S. at 74. Thus, in one regrettable stroke, the Court of Appeals has rejected both the procedural and substantive safeguards set forth in *New York Times* to preserve "the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell*, 108 S. Ct. at 879. Accordingly,

suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.

376 U.S. at 270 (citation omitted).

the *Journal News* respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

**UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT**

No. 86-3170

DANIEL CONNAUGHTON,
Plaintiff-Appellee,
v.

HARTE HANKS COMMUNICATIONS, INC.,
Defendant-Appellant.

Argued Jan. 20, 1987

Decided Jan. 28, 1988

Rehearing and Rehearing En Banc
Denied April 4, 1988

Richard L. Creighton, Jr. argued, Cincinnati, Ohio,
for defendant-appellant.

John A. Lloyd, Jr. argued, Cincinnati, Ohio, for
plaintiff-appellee.

Before KEITH, KRUPANSKY and GUY, Circuit
Judges.

KRUPANSKY, Circuit Judge.

Appellants challenge this Court to determine the limits
of its responsibility to review a jury's verdict against a

publisher in this action for libel implicating important First Amendment issues pursuant to the dictates of the Supreme Court mandating appellate courts to conduct an independent examination of the entire record of the proceedings to ensure that the judgment does not pose a forbidden intrusion into First Amendment rights of free expression. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984); *St. Amant v. Thompson*, 390 U.S. 727, 732-33, 88 S.Ct. 1323, 1326-27, 20 L.Ed.2d 262 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 728-29, 11 L.Ed.2d 686 (1964).

The gravamen of the assignment imposes the commitment to explore the delicate relationship between First Amendment rights of free expression and the common law protection of an individual's interest in reputation. *Ollman v. Evans*, 750 F.2d 970, 974 (D.C.Cir.1984) (en banc), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985).

The threshold to the resolution of the appellant's challenge is complicated by an illusory conflict between equally imposing rules of law. Juxtaposed are the clearly erroneous and due regard standard of appellate review that shall be accorded to the opportunity of the factfinder to assess the credibility of the witnesses upon direct and cross examination, either the judge in a bench trial as imposed by Fed. R. Civ. P. 52(a), which dictates that

[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to to the opportunity of the trial court to judge of the credibility of the witnesses,

or judicial precedent that impresses the identical clearly erroneous and due regard standard of appellate review upon factual findings of a jury, *see, e.g., Strauss v. Stratojac Corp.*, 810 F.2d 679, 685 (7th Cir.1987) ("This court can overrule the jury's determination only if it is clearly

erroneous."); *Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago*, 700 F.2d 1143, 1156 (7th Cir.1983) ("[W]e must accept the findings of the jury unless those findings are clearly erroneous."); *accord Manufacturers Hanover Trust v. Drysdale Sec. Corp.*, 801 F.2d 13, 27 n.8 (2nd Cir.1986) (A jury's "responses to factual interrogatories . . . [are] subject to the clearly erroneous rule on appeal. . . ."), *cert. denied sub nom. Arthur Andersen & Co. v. Manufacturers Hanover Trust*, — U.S. —, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987)¹, with the Supreme Court's equally decisive command to appellate courts in cases involving considerations of actual malice joining First Amendment issues to "make an independent examination of the whole record" and insure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. at 285, 84 S.Ct. at 729 (footnote omitted) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683 9 L.Ed.2d 697 (1963)). These rules probe the court's reasoning in its disposition of this appellate review.

Guidance in harmonizing the rules confronting the court in its search for a resolution is afforded by the pronouncements of *Bose Corp.*:

Our standard of review must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co. v. Sullivan*. The conflict between the two rules is in some respects more ap-

¹ Given that the clearly erroneous standard of review applies equally to factual findings of a judge in a bench trial or in a jury disposition, *see Strauss v. Stratojac Corp.*, 810 F.2d 679, 685 (7th Cir. 1987); *Manufacturers Hanover Trust v. Drysdale Sec. Corp.*, 801 F.2d 13, 27 n. 8 (2nd Cir.1986), *cert. denied sub nom. Arthur Anderson & Co. v. Manufacturers Hanover Trust*, — U.S. —, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987), the reasoning and conclusions of the Supreme Court in *Bose* are particularly applicable to the instant case wherein the jury's verdict was accompanied by specific findings of fact.

parent than real. The *New York Times* rule emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. [364], 395, 68 S.Ct. [525], 542, 92 L.Ed. 746 (1948)]. Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due.

Bose Corp., 466 U.S. at 499-500, 104 S.Ct. at 1959 (emphasis added).

Mindful of the dictates of *Bose Corp.* this court's attention is, in the first instance, directed to an examination of the entire record of subsidiary, operative or preliminary facts (hereinafter referred to as the operative facts), however characterized, to determine if the jury's findings were clearly erroneous. The chimera of discord between these respected rules of law emerges from a befitting cyclorama of a political campaign with an uncomplicated scenario that is a model for joining the sensitive constitutional issues presented with clarity and precision.

Daniel Connaughton (Connaughton), the plaintiff-appellee, a highly reputable and respected young attorney in the City of Hamilton, Ohio, a former Hamilton City Prosecutor, Assistant Butler County prosecutor, acting judge of the Municipal Court of Hamilton, Ohio and successful practicing lawyer, filed his declaration of

candidacy during February of 1983 for a judgeship on that court to be decided at an election on November 8, 1983. During the time period relevant to this dispute the defendant-appellant, Harte Hanks Communications Inc. (Hanks or Journal), owned and published the *Journal News* (Journal), a daily afternoon newspaper that enjoyed the greatest circulation in the Hamilton, Ohio area. The *Cincinnati Enquirer* (Enquirer), a morning newspaper published in Cincinnati, Ohio, and a successful competitor of the *Journal*, was threatening its circulation in the area. James Dolan (Dolan), who had been the endorsed candidate of the *Journal* prior to his election to his first six-year term of office, was the incumbent judge Connaughton sought to replace at the forthcoming election. Since both candidates were prominent Democrats and no Republican declaration of candidacy had been filed, Connaughton's announcement caused Dolan to file as an Independent to avert a primary election. Without issues, the campaign struggled through the summer doldrums as a typical colorless and uneventful judicial contest with the parties extolling their own qualifications and experience to attract voter support. In September, however, the campaign exploded into the most notorious contest in Butler County.

Background for the probative operative facts which joined the constitutional issues of this case is best presented in a resume of proofs developed by the respective parties during the course of the trial.

Plaintiff-appellant, at the outset of his case, conceded that he was a "public figure" as defined in relevant Supreme Court precedent. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974); *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Thus, Connaughton was charged with the burden of proving by clear and convincing evidence that the allegedly libelous November 1, 1983 article here in controversy was pub-

lished with "actual malice,"—that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." See *New York Times v. Sullivan*, 376 U.S. at 280, 84 S.Ct. at 726.

Briefly summarized, the plaintiff's proof disclosed that for a considerable period of time before Connaughton's announcement of candidacy, unsupported rumors persisted throughout Butler County linking Billy New (New), the Director of Court Services and Chief Administrative Officer for the City of Hamilton Municipal Court, a Dolan appointee, with alleged corrupt practices arising from the administration of his official position. Subsequent to his declaration of candidacy, Connaughton, during the early stages of his campaign, criticized Dolan for the disposition of an inordinately large number of cases in his chambers rather than in open court, as well as for the leniency that Dolan extended in DWI (driving while intoxicated) cases. He at no time alluded to the unsupported rumors of corruption associated with the Hamilton Municipal Court.

On or about September 8, 1983, June Taylor (Taylor), the president of the Southern Ohio chapter of MADD (Mothers Against Drunk Driving), advised Connaughton's wife Martha to contact Patty Stevens (Stevens) who had important information concerning her former husband Jack Schreifer's treatment in the Hamilton Municipal Court which Stevens was desirous of bringing to public attention. On September 15, as a result of Taylor's request, Connaughton's wife visited Stevens at her residence and told her that Connaughton would meet with Stevens if she had information concerning the administration of the court. Stevens gave no indication of her personal involvement and intimate knowledge of New's extensive solicitation and acceptance of bribes. She indicated that she would notify Martha Connaughton in the event that she decided in favor of disclosing her information. On Friday, September 16, Stevens in-

structed her mother to telephone Connaughton's wife to arrange a meeting with Connaughton after she, Stevens, finished work at 11:00 p.m. that night at which time she would make her information available.

Stevens and her sister, Alice Thompson (Thompson), who volunteered to accompany Stevens, were taken from their mother's home to the Connaughton residence, arriving there at approximately 12:30 a.m. on Saturday, September 17. Connaughton had requested his brother-in-law, Dave Berry (Berry), Ernest Barnes (Barnes), a Hamilton deputy fire chief, Janet Barnes (J. Barnes), Barnes' wife and a former *Journal* employee, and his campaign manager, Joe Cox (Cox), to attend the meeting as witnesses. Connaughton also insisted that the conversations be tape-recorded.

For three and one half hours Stevens related a revealing series of events that occurred over an extended period of time during which she served as an intermediary for New who was soliciting and accepting bribes from individuals for favorably disposing of pending criminal charges against them in Dolan's court. She charged that New often transacted his illegal business in Dolan's chambers and in his presence. Thompson volunteered the lenient treatment she had received from Dolan when she had been represented by Matt Crehan (Crehan), a personal friend and ardent political supporter of the judge who had defended her against charges of assault and shoplifting in Dolan's court. This was her only contribution to the information disclosed at the meeting.

The implications of the Stevens' disclosures stunned Connaughton and confronted him with a dilemma. As a lawyer, he had the ethical and legal responsibility of immediately bringing the alleged criminal acts of magnitude to the attention of the appropriate authorities or suffer the consequence of withholding disclosure until after the November election. Moreover, he had no basis

for gauging the credibility of either Stevens or Thompson in his evaluation of their information. After considering his position over the weekend of September 17 and 18, he proceeded to seek advice from the Butler County prosecutor on Monday September 19. The County Prosecutor suggested that the interview tape be processed through the Hamilton Safety Director and Police Department and that a routine investigation be initiated by those local law enforcement authorities. A polygraph test was arranged for the two women. The results of the test indicated that Stevens was truthful. Thompson refused to undergo the examination.

As rumors of New's corruption became more prevalent, Dolan requested that he resign his post as Director of Court Services. New complied on September 22, 1983. On September 27, after Stevens' credibility had been verified through the polygraph examination, Connaughton delivered the Stevens-Thompson tape to the Hamilton Public Safety Director and Chief of Police and, upon their direction, filed a complaint alleging that New had accepted monies through an intermediary from criminal defendants "for the purpose of disposing of cases in a manner not provided by law." As a result of the ensuing police investigation, both Stevens and Thompson were interviewed by the local law enforcement authorities. New was arrested on October 3 and charged with three counts of bribery. He was subsequently indicted by a Butler County Grand Jury. Dolan indignantly publicly characterized Connaughton's charges against New as "dirty politics."

In response to Dolan's charges of "dirty politics," Connaughton, on October 19, 1983, authored a "letter to the editor" which was published in the *Journal* on October 20. In his letter, Connaughton detailed the manner in which he had received the information which supported his criminal complaint against New and the precautions that he had taken to verify the charges leveled

by his informants which resulted in New's arrest on October 3, 1983. He explained how he had consulted the local law enforcement authorities and how he had acted upon their advice.

On October 25, 1983, Dolan conferred with Jim Blount (Blount), Editorial Director of the *Journal* whom he had known for 25-30 years, and informed him that as a result of the criminal complaint filed against New by Connaughton the *Enquirer* was planning to publish an uncomplimentary article concerning his tenure as Judge of the Hamilton Municipal Court. Dolan advised Blount that he was desirous of discrediting this article with favorable responsive news coverage of his activities. Blount suggested that if Dolan scheduled a news conference to respond to any *Enquirer* story, the *Journal* would assign a reporter to be in attendance.

In its October 27, 1983 morning edition, the *Enquirer* published a front page article about Dolan's court bearing the headline "Judge's Closed-Door Cases Raise Legal Eyebrows." The *Enquirer* article criticized Dolan for engaging in a routine practice of disposing of cases behind closed doors in the absence of the prosecutor. The article detailed "three instances where the practice led to abuse." At trial, Blount reluctantly acknowledged that the *Enquirer's* October 27, 1983 article was "one of the most spectacular stories" that had ever been written about the Municipal Court and had attracted widespread public notice.

The plaintiff's evidence also developed that prior to the *Enquirer* story of October 27, Blount and Joseph Cocozzo (Cocozzo), the publisher of the *Journal*, had, on or about October 19, conferred with Billy New's defense counsel, Hank Masana (Masana), at Masana's request. Masana had advised Blount and Cocozzo that Thompson wished to reveal various promises Connaughton had made to her and her sister for disclosing unfavorable informa-

tion about the Hamilton Municipal Court and how he intended to confront Dolan with the Stevens-Thompson tape and force him to resign so that he, Connaughton, could become judge. Masana explained that the meeting was being arranged at the request of Dolan's long time friend, Creton, who incidentally had requested Connaughton to withdraw from the Dolan judicial race to assure Dolan's re-election, and who had also represented Thompson before Dolan on her assault and shoplifting charges. The meeting in Masana's law office coincidentally occurred on October 27, 1983, the same day as the *Enquirer* published its story about the Dolan court. The meeting was attended by Thompson, Masana, Blount, and Pamela Long (Long), a staff reporter for the *Journal*. At the time of the interview, Blount was aware of the background of the arrangements for the interview and the relationship of the parties. He also knew that Thompson had been subpoenaed to appear as a witness before the Grand Jury. Masana was present during the entire interrogation of Thompson and on a number of occasions refreshed her memory with leading questions and suggestions.

Before Thompson's statements were recorded, the parties had an off-the-record discussion during which Blount and Long assured Thompson that the tape of her accusations would never be made available to anyone, including Connaughton. Under questioning, Thompson related incriminating promises and inducements allegedly made by Connaughton to the sisters during the September 17 meeting at the Connaughton residence while the tape recorder was turned off and at other unrecorded and unwitnessed meetings with the Connaughtons. She charged Connaughton with being a liar who had tricked her and her sister into making their disclosures and asserted that during the first meeting which occurred at the Connaughton home on September 17, 1983, Connaughton had promised the sisters a Florida vacation after the

election, an invitation to Cincinnati's Maisonette restaurant, employment in a restaurant or at the court and further guaranteed them absolute anonymity in exchange for unfavorable information about the Hamilton Municipal Court and/or Dolan. Her most damaging accusation was an allegation that Connaughton, after becoming aware of the highly incriminating information, stated that he intended to confront Dolan with the tapes with the threat of making them public if he, Dolan, refused to resign in Connaughton's favor. Her allegations against Connaughton implicated grave ethical breaches as well as serious criminal acts of extortion and suborning perjury.

Connaughton's evidence further disclosed that it was apparent to all present at the Thompson interview that she was in a highly emotional state of agitation and distress, that she was disgruntled and vindictive because she had been subpoenaed to testify before the Grand Jury and because her friends accused her of being a "snitch" and a "rat." She attributed the totality of her predicament to Connaughton whom she charged with lying and breaching his promise to ensure her anonymity. Thompson admitted her criminal background and Blount had an awareness of psychiatric treatment for emotional instability and mental problems that she had received at Hughes Hospital.

Thompson sought to credit her statements through verification by Stevens who would in Thompson's words "tell you about the trips, the dinner at the Maisonette, the jobs and everything. She'll tell you the truth, because they was offered to her too." At trial, however, Stevens denied the promises and accused her sister of lying. During the course of the interview Thompson made two significant statements that reflected upon her credibility. She related how she had advised the *Enquirer* of her charges against Connaughton and that the *Enquirer*, after considering her assertions, refused to

print her accusations. She also stated that she had brought her charges of impropriety against Connaughton to the attention of the Hamilton Police who also refused to take action against Connaughton. At the conclusion of Thompson's interview, Blount assigned Long to write a story based upon the Thompson information.

Subsequent to the interview, Blount convened a meeting which was attended by the managing editor Walker, reporter Long, and himself where it was decided that, apart from Long's assignment to "write the story," no further action would be taken until the following afternoon, Friday October 28. Thompson's questionable credibility was discussed. On October 28, at Blount's instruction, the managing editor scheduled a meeting with the city editor, the news editor, Long, and eight or nine reporters. During the course of the meeting, the managing editor assigned the reporters on a one-on-one basis to interview each of the individuals who had been present at the various meetings attended by Stevens and Thompson, including the one at the Connaughton residence on September 17 when the Stevens-Thompson statements were recorded. The reporters were instructed to conduct an interrogation of the witnesses in accordance with a predetermined list of questions that had been devised by Long and Blount. It is significant to note that no one was assigned to interview the key witness, Stevens, who was present with her sister at each of the meetings where the incriminating Connaughton statements were allegedly made, and who was the single witness who could attest to Thompson's credibility, the extent of her emotional instability, her propensity for lying, and her psychiatric condition and treatment. Blount also decided at that meeting that the assigned interviews were not to commence until the following Monday which was October 31, the day after he published his Sunday column, "Editors [sic] Notebook."

Apart from the consistent favorable coverage accorded to Dolan by the *Journal* throughout the campaign as con-

trasted to the generally unflattering negative coverage accorded Connaughton, it was not until after the October 27 *Enquirer* story and the Thompson interview that an intention of the *Journal* to discredit Connaughton, and through him the *Enquirer*, appeared to materialize.

Mindful of the fact that Blount and the publisher of the *Journal*, Cocozzo, were in possession of the volatile October 27th Thompson tape charging Connaughton with extortion, deception, lying, and general unethical conduct, which Cocozzo recognized and acknowledged to be highly defamatory and damaging to Connaughton personally, professionally, and politically; and mindful of the fact that no one at the *Journal* had made an effort to listen to the Stevens-Thompson tape of September 17, which Blount had described as worthless junk; and that Thompson's credibility was questionable and of concern to Cocozzo, the publisher, Blount, the editorial director, and Walker, the managing editor; and mindful of the fact that, at this juncture of the developments, Thompson's credibility had not been investigated or verified, Blount, in his column "Editor's Notebook" written on or before Saturday October 29 and published on Sunday October 30, disclosed a blueprint from which the jury could have concluded that the *Journal* had by that date already intentionally and irreversibly decided to discredit Connaughton by printing the Thompson charges thereby impugning the *Enquirer* and its image in the Hamilton area to enhance its own, the *Journal's*, circulation at the expense of the *Enquirer*.²

² In pertinent parts, the article read:

According to our recent observations, most voters consider it a tough decision—and getting tougher.

Last week's array of charges and counter charges probably has taken some votes from Dolan. But it isn't certain if it has boosted Connaughton's prestige.

* * *

As the heat increases, it also appears most voters want to be sure they will support the most honorable and cleanest candi-

The jury could have concluded that Blount's October 30 Editor's Notebook column, which was headlined "Municipal Court Race Will Have More Than One Loser,"

date, not just the one with the most appealing face, the most familiar name, the most advertising or the most votes.

As one voter remarked, "I want to be sure that my vote won't be discredited by something that happens after the election is over."

Another said "I don't mind voting for people I know may lose an election, but I resent voting for a person who I later find has been deceitful or dishonest in campaigning."

* * * *

Complicating the campaign are the bribery charges pending against Billy New, a former court employee.

Of course, it should be emphasized that New hasn't been tried, and that a person is presumed innocent until proven guilty. It also should be stressed that New hasn't been indicted. In fact, his case hasn't been weighed by a grand jury.

Stories on the Dolan-Connaughton fight in the *Enquirer* last week certainly helped to fuel the fire.

But in the process, the motives and credibility of the Cincinnati newspaper also are in question.

Some observers are asking how the *Enquirer* can justify the placement of a story critical of Dolan at the top of page one Thursday morning, Oct. 27, two days after U.S. forces participated in the invasion of Grenada, a day after the legality and necessity of the military action was questioned or condemned by some members of Congress and U.S. allies, and while the nation was still angered by the deaths of more than 225 U.S. Marines in a terrorist explosion last Sunday.

Judge Dolan suggested an answer when he charged Jim Delaney, an *Enquirer* editor, with threatening a page one smear Thursday morning if the judge didn't cooperate with the newspaper and its reporter (Karen Garloch), and if the judge didn't cancel a press conference, open to all media, scheduled for Thursday afternoon.

Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision makers.

[Continued]

was carefully contrived and designed to condition the public to the Thompson charges which were to be published two days later on November 1st. It could have decided that the article was calculated to project the *Journal* in the role of the guardian of the public interest, courageously disclosing Connaughton's "dirty politics" and the cabalistic motives of the *Enquirer* to promote the candidacy of Connaughton by smearing Dolan. The thrust of the article, including the headline, predicted that the election would result in more than one loser; it urged the voters to support "the most honorable and cleanest candidate"; it speculated through the shopworn cliché of quoting a concerned undisclosed source who resented "voting for a person who I later find has been deceitful or dishonest in campaigning," the precise environment and image characterizations the *Journal* article of November 1 would impress upon Connaughton's campaign and his personal, professional and political reputation; it attempted to discredit the *Enquirer* story of October 27, 1983 by reporting a mysterious relationship, rumored to exist between Connaughton and "a wealthy, influential link to *Enquirer* decision-makers," which Blount knew to be untrue because it had been denied during a direct confrontation with Con-

² [Continued]

Meanwhile, the dilemma facing the *Journal News* is what to do about an endorsement in the Dolan-Connaughton race.

Should the newspaper play it safe and skip an endorsement for fear that the post-election disclosures could embarrass or discredit the newspaper?

Or should a *Journal News* editorial simply remind voters, as was mentioned earlier, that everyone is innocent until proven guilty and that, in fact, there are no charges pending against the judge?

But taking a safe self-serving course would be shirking a responsibility held sacred by this newspaper.

The complete Editor's Notebook column of October 30th, designated as Appendix A, is attached to the end of the majority's opinion.

naughton.³ Having established a fictitious link between Connaughton and the *Enquirer*, Blount's article questioned the motives and the integrity of the *Enquirer* story of October 27 and through Dolan's words labeled it as a Dolan smear calculated to advance the dirty political campaign waged by Connaughton. The jury could have further concluded from the evidence that the *Journal's* action after the Thompson October 27 interview was nothing more than a charade to cloak its true motives for publishing its November 1st defamatory story.

Between October 31 and the election, the actions of the *Journal* appeared to implement Blount's prophecies of October 30. Its November 1 article through Thompson's charges branded Connaughton as a liar, an extortionist, an unethical opportunist who was waging the very type of "deceitful" and "dishonest" and generally "dirty" campaign which Blount's anonymous citizens were fearful would result in the election of a person unfit to hold public office.⁴

³ The absurdity of Blount's unfounded accusation was clearly reflected by the record and his own statement which capsulized his mindset, during cross-examination in response to the following question:

"Did you do anything to verify whether this was true before you wrote it in this column?", to which he stated:

"The rumor was certainly true. I did not have to verify it. I heard it many times."

⁴ This court is not suggesting "that a question of actual malice arises whenever a libel plaintiff introduces evidence that the newspaper vigorously pursues high-impact stories of alleged wrongdoing." *Tavoulareas v. Piro*, 817 F.2d 762, 835 n. 48 (D.C. Cir. 1987) (en banc) (McKinnon, J., dissenting) (quoting *id.* at 797 (majority opinion)), *cert. denied*, — U.S. —, 108 S.Ct. 200, 98 L.Ed.2d 151 (1988). Clearly, newspapers may investigate and report about issues relating to hard-fought campaigns and allegations of potential misconduct on the part of candidates. The media should be accorded the widest latitude and freedom to endorse and promote

On Monday, October 31, the *Journal* editors knew that all witnesses to the Connaughton/Stevens/Thompson meetings, without exception, had categorically denied Thompson's allegations. Blount testified that on October 31st, he knew that no one had credited Thompson's charges, however, it was his personal opinion that she was credible because he personally had verified her credibility through Tom Grant (Grant), the *Journal's* reporter assigned to the police beat, whom he had instructed to interview the detectives investigating the New case. He also stated that he had verified her credibility through certain other detectives whose names he could not recall. The evidence disclosed, however, that Grant contradicted Blount's statements and testified that he was never instructed to confirm Thompson's credibility and, in fact, never did so. The extent of his assignment was to deter-

candidates and issues of their choosing as, within their judgment, is warranted.

We are not suggesting that there is something wrong with aggressive investigative reporting, especially where public corporations or public officials are involved. The exposure of wrongdoing by individuals, and especially by public individuals, is one of the highest functions of the press in our society. Newspapers provided a vital service by acting as watchdog for the public. This interest is protected by *The New York Times* actual malice standard. It is not further protected by requiring the jury to blind itself to evidence of editorial pressure for sensationalistic stories.

Tavoulareas, 759 F.2d 90, 121 n. 39 (D.C. Cir. 1985), *rev'd en banc*, 817 F.2d 762 (D.C. Cir. 1987), *cert. denied*, — U.S. —, 108 S.Ct. 200, 98 L.Ed.2d 151 (1988); *accord* 817 F.2d at 796 nn. 49 & 50. These first amendment protections do not, however, imply a license to publish known falsehoods or to ignore elementary precautions which are demonstrative of highly unreasonable conduct that constitutes an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers even under circumstances involving public officials or public figures. Nor is the media immunized from liability for intentionally or recklessly published falsehoods merely because they happen to be reporting about election campaigns or potential political misconduct.

mine if the New inquiry was continuing as an ongoing investigation.

On October 31st the *Journal* arranged an interview with Connaughton under the pretext of conducting a final endorsement evaluation. Blount, Cocozzo, and Jeanne Houck (Houck), a reporter, were in attendance when Connaughton and his brother-in-law, Berry, arrived at the offices of the *Journal*. A general discussion ensued during which time Connaughton, in response to questions from Blount and Cocozzo, reviewed the chronology of events that had occurred since September 17. This initial perfunctory interview disclosed no information that was not already within the knowledge of the *Journal*. The conversation was not tape-recorded. During the course of the meeting, Blount received a telephone call subsequent to which he immediately terminated the conference and advised Connaughton and Berry that two of his reporters were desirous of briefly speaking with them. Connaughton and Berry accompanied Blount to the second floor of the building. They were separated at this point with Berry being directed into a room with Laurel Campbell (Campbell), a reporter, while Connaughton and Blount entered the office of the managing editor, Walker. They were joined by Long. Connaughton was not then or thereafter advised of the Thompson accusations of October 27, nor was he permitted to listen to the tape-recording of that interview. A tape recorder was activated and during the early stages of the interrogation Connaughton was asked if he had promised Stevens and Thompson anonymity if they provided him with adverse information about the administration of the Hamilton Municipal Court or Dolan, and if he had promised the women a victory dinner at the Maisonette, jobs in a restaurant or at the courthouse and a Florida vacation. Although Connaughton was surprised at the new line of inquiry, he emphatically denied each of the incidents incorporated into various direct questions. He

was asked if he had ever indicated to anyone that he intended to confront Dolan with the Stevens/Thompson tape with the threat of making it public if Dolan refused to resign. Connaughton characterized the accusation as absurd and denied it. Thereafter, he was requested to respond to a series of hypothetical questions which were designed to elicit speculative answers as to the mental and motivational stimuli that may have prompted a person to infer from his, Connaughton's, remarks at the meeting of September 17th and thereafter between Stevens, Thompson, and Connaughton and others that he was promising the women anonymity, dinner at the Maisonette, employment and a Florida vacation for their information or that it was his intention to blackmail Dolan into resigning so he, Connaughton, could replace him as judge. Connaughton's answers to these questions are a matter of record and when read in context do not support the *Journal's* conclusions that he admitted to any of the Thompson charges which he had unequivocally denied during the early stages of the interview.⁵

⁵ The dissent, by characterizing as admissions Connaughton's answers to the *Journal* reporter's hypothetical questions during the interview of October 31st, which questions were calculated to elicit purely speculative answers and conjectures, without considering Connaughton's expressed denials to direct questions concerning Thompson's controversial testimony and her purely subjective understandings of Connaughton's statements, or any of the other evidentiary evaluations of the conflicting testimony, clearly demonstrates the wisdom of the Supreme Court's teachings in *Bose*, which were designed to protect a plaintiff's rights to a jury trial in a defamation case against invasion of the jury's fact-finding prerogatives anchored in credibility assessments of witnesses available only to the actual trier of fact.

The instant case affords the perfect vehicle for reflecting the implementation of both case law and Rule 52(a) in assigning deference to a jury's findings of fact unless such findings are clearly erroneous, because it is a case that requires the factual evaluation of conflicting testimony as to a single issue involving the credibility of witnesses. In sum, in the instant case the jury clearly

To summarize, by the evening of October 31, the *Journal* knew that the Thompson accusations were by Cocozzo's admissions defamatory. It knew that it was confronted with a serious credibility problem with Thompson. It knew that, without exception, all of the witnesses interviewed by its staff disclaimed Thompson's accusations and discredited her charges. It knew that it had deliberately avoided interviewing Stevens, Thompson's sister, who was the single person that was present at all of the meetings between Connaughton and Thompson, and who was intimately aware of the extent of Thompson's emotional instability, mental problems, and psychiatric treatment. Blount knew that he had not conducted any investigation of Thompson's credibility within the context of the Connaughton accusations. The *Journal* also knew that Connaughton had denied each of the Thompson allegations when it scheduled what it styled as a prepublication legal conference with its lawyer, James Irwin (Irwin), for 9:00 a.m. on November 1st, the following day.

The meeting was attended by Cocozzo, Blount, Walker, Long and Irwin before the 10:30 a.m. *Journal* deadline. Irwin conceded that he had not listened to the September 17 Stevens/Thompson tape, the October 27 tape of Thompson's accusations, or the Connaughton interview of October 31st. He admitted that he had not been advised that no one at the *Journal* had listened to the September

conveyed its findings in its answers to specific interrogatories by assigning greater credibility to the testimony and evidence of Connaughton and his witnesses than to the evidence and testimony of the defendants' witnesses after having assigned credibility evaluations to those witnesses.

The jury refused to believe the theory of the defense and the testimony of its witnesses. The majority, in its decision, has refrained from invading the province of the fact finder by substituting its interpretations of the testimony and evidence of either party. It has merely attempted to emphasize that the jury's findings as to the operative facts of this case were not clearly erroneous in view of the record taken in its entirety.

17 Stevens/Thompson tape; that everyone interviewed, without exception, discredited Thompson's charges and that the *Journal* had no verification or support of Thompson's credibility; and that no one at the *Journal* except Blount and Long knew the content of the Connaughton tape of October 31st. He admitted that although he had not listened to Connaughton's interview of that date he had accepted Blount's assurances that Connaughton had admitted Thompson's charges. He conceded that he was aware of the credibility issue that was presented by Thompson. Irwin testified further that the only documents that he reviewed before approving publication of the November 1 article were the galley sheets which were presented to him at the beginning of the meeting. He stated that Blount assured him that Thompson was credible, however, Irwin never made inquiry as to the scope or extent of the *Journal's* investigation into Thompson's credibility as it concerned the Connaughton accusations. He stated that although the article appeared offensive, it was not libelous because it incorporated denials by Connaughton. Although he knew extortion and subornation of perjury were criminal offenses and that the Thompson allegations may have inferred unethical conduct, the proposed article was, at least in his opinion, politically advantageous to Connaughton. He did not, however, explain this conclusion. He conceded further that his approval of the article for publication was primarily premised upon his line by line review of the galley sheets, Blount's unconfirmed personal opinion of Thompson's credibility, and his assurances that Connaughton had admitted the Thompson charges. In any event, within this scenario, the *Journal* published the article.

Connaughton occupied himself during the remainder of the campaign by denying Thompson's incriminating accusations. The *Journal* published his denials which merely emphasized, through repetition, the magnitude of the accusations. Predictably, as a finale to its charade, the *Journal* endorsed Dolan two days before the election.

The results of the election were not surprising. The *Journal's* endorsed candidate Dolan won. Connaughton lost. The effect of the *Journal's* campaign upon the circulation of the *Enquirer* was not probed since it was not an issue of this legal action.

The *Journal's* evidence relied primarily upon the testimony of the publisher, management and other personnel, most of whom had already testified as if on cross examination during the plaintiff's presentation. The thrust of its testimony endeavored to convince the jury that the *Journal* pursued a totally fair and impartial course of conduct throughout the entire campaign, including the critical period between September 17th and the election. It attempted to develop the thoroughness of its investigation and its reliance upon legal advice before publishing the November 1st article about Connaughton. The defendants sought to prove that it implemented established guidelines to ensure accuracy and balance in its article and in verifying the credibility of its sources of information. Defendants contended that at the conclusion of its investigation it was satisfied of Thompson's credibility. They presented evidence that was intended to refute the plaintiff's contention that the *Journal's* motivation for the November 1st Connaughton article was its competition for circulation with the *Enquirer* within the greater Hamilton market. It affirmatively asserted the plausibility of Thompson's charges that the promises of anonymity, the Maisonette victory dinner, jobs and a Florida vacation, as well as the threat against Dolan, were made by Connaughton and deliberately unrecorded during the September 17 Stevens/Thompson interview and during other unrecorded and/or unwitnessed meetings between Stevens/Thompson and the Connaughtons. The *Journal*, through its witnesses, offered testimony to prove that it had no intention to defame or discredit Connaughton either personally, professionally, or politically and that it had a responsibility to the public to publish the news-

worthy Connaughton accusations, together with his denials. It contended that its investigation of Thompson's credibility was more than adequate. The defendants also urged that the article of November 1st was a balanced article in that it carried Connaughton's denials of the Thompson charges, which demonstrated the *Journal's* fairness and impartiality and a lack of intent to injure Connaughton.⁶

The defendants' evidence came to a dramatic conclusion when defense counsel requested an in-chambers conference with the court and plaintiff's counsel where it was announced that on the previous evening defendants' counsel received a telephone call from Stevens requesting a meeting. Defense counsel advised the court that Stevens had signed an affidavit wherein she attested to a conver-

⁶ The defendant argued that since it had published a letter from plaintiff responding to one of defendant's earlier articles, it had therefore reported this case in a balanced and neutral manner, and thus could not be found to have acted with actual malice. However, it is clear that "mere publication of a denial by the defamed subject does not absolve a defendant from liability for publishing knowing or reckless falsehoods." *Tavoulareas*, 759 F.2d at 133. The fact that defendant published plaintiff's denial of inferences contained in its articles is not dispositive of whether defendant printed the falsehoods with actual malice.

The fact that [defendant] published [plaintiff's] denial . . . does not in any way vitiate the value of the evidence that [defendant] published the charge with reckless disregard for truth or falsity. . . . Surely the First Amendment does not prevent a finding of actual malice whenever a defendant publishes false defamatory statements accompanied by denials.

Tavoulareas, 817 F.2d at 831 n.42 (McKinnon, J., dissenting).

Furthermore, printing a denial of accusations made in an article does not necessarily insulate a newspaper from liability since it fails to correct the damage already done by the dissemination of the falsehood. *Tavoulareas*, 817 F.2d at 839 (McKinnon, J., dissenting) ("[merely printing a denial] falls far short of redeeming a pattern of behavior that displays, clearly and convincingly, a reckless disregard for truth or falsity.").

sation with Connaughton on the previous Tuesday while driving to the courthouse, during which she suggested to Connaughton that her friends had urged that she was entitled to receive at least 10% of whatever recovery resulted from the lawsuit. She stated that Connaughton offered to "take care of her and all of his friends" and that she should continue to stand by her story. Defense counsel also indicated that the affidavit stated that her sister's charges against Connaughton were true. Defendants' counsel advised the court that the Stevens affidavit was being placed before the court and plaintiff's counsel to afford the plaintiff an opportunity to dismiss the lawsuit.

Needless to say, the court and plaintiff's counsel were stunned by the revelation. Plaintiff's counsel conferred with his client and advised the court that his client insisted upon proceeding with the trial. The court refused plaintiff's counsel the right to privately confer with Stevens before she was presented as a witness.

Stevens was recalled by the defense as if on cross examination and testified in accordance with the defendants' in-chambers disclosures. At the conclusion of the defendants' cross examination of Stevens, plaintiff's counsel was permitted further direct examination but was foreclosed from leading the witness. Plaintiff's counsel developed that Stevens had, in fact, been urged by her sister and mother to seek 10% of any recovery. Stevens further testified that on the previous night she had learned from another of her sisters that Thompson and her mother were to be witnesses before the jury and that both of them would lie by testifying to an alleged written promise by Connaughton to pay Stevens 10% of any recovery that he would receive as a result of his lawsuit if she continued to support him by disclaiming Thompson's accusations. She testified further that she did not wish to have her sister and mother criminally involved as a result of lying under oath and was troubled by the

antagonism displayed against her by her mother and sister and was not desirous of further aggravating the widening rift between them. Upon further examination, she admitted that Connaughton had never offered her any money; that her affidavit was untrue and that she had testified truthfully during her first appearance when she discredited her sister's accusations against Connaughton.

In sum, she recanted her affidavit to the defendants.

Connaughton on rebuttal supported her testimony and disclaimed any offer of money or other consideration for her testimony.

On this note, the evidence concluded and the case was submitted to the jury upon the court's instruction. As a part of its comprehensive instruction, the court advised the jury that the burden rested upon the plaintiff to prove the element of actual malice by clear and convincing evidence and thereafter concisely and in simple terms defined the phrase "clear and convincing evidence." At the conclusion of its deliberations, the jury returned a verdict in favor of the plaintiff Connaughton and awarded damages in the amount of \$200,000. In conjunction with its verdict, the jury, in answer to special written interrogatories, concluded (1) that the November 1, 1983 front page article was defamatory; (2) that the article was false; (3) that the article had been published with actual malice.

The defendant Hanks-Journal filed a motion for judgment notwithstanding the verdict (j.n.o.v.) which the district court denied upon a finding that "a properly impaneled jury, correctly instructed, awarded a verdict against Defendant that is supportable from the evidence adduced."

In *New York Times* and *Gertz*, the Supreme Court enunciated the burden of proof imposed upon a public figure in pursuing a claim of defamatory falsehood as

"actual malice" established by clear and convincing evidence that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for the truth. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094 (1967) observed that public figures "were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard."

The year following the *Butts* decision, the Supreme Court in *St. Amant v. Thompson*, 390 U.S. at 732, 88 S.Ct. at 1326 declared that the "finder of fact must determine whether the publication was indeed made in good faith." The court proceeded to elaborate by explaining that sufficient proof must support the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication and that

[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. *Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*

Id. (emphasis added) (footnote omitted). The Court emphasized that malice depended upon a showing that the defendant acted with improper motive—an evidentiary subjective pursuit calculated to probe the defendant's state of mind in an effort to disclose the intent or purpose for the publication which, in turn, depended squarely upon credibility assessments best determined by

a jury as ultimate factfinders after visually observing the witnesses upon direct and cross examination and evaluating their manner of testifying, the reasonableness and probability of their testimony, the accuracy of their memory, the opportunity they had to see, hear, and know the things about which they testified, their candor and lack of candor, their interest and bias, if any, together with all other circumstances surrounding their testimony.⁷

The instant case did not present multifaceted possibilities of interpretation that "bristled with ambiguity." The core issue was simply one of credibility to be attached to the witnesses appearing on behalf of the respective parties and the reasonableness and probability assigned to their testimony.

The wide disparity between the proof of the plaintiff and the defendants in this case demonstrated with clarity that the jury verdict was firmly if not exclusively anchored in credibility evaluations and assessments. If the jury had credited the defendants' evidence, it would have concluded that the *Journal* was not motivated to publish the November 1 front page article by a desire to promote Dolan as its candidate for the Hamilton Municipal Court judgeship by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons. It could have easily concluded that Thompson's charges

⁷ The Supreme Court has recently reaffirmed the principle that in a libel action, credibility is a factual assessment to be made by the jury, and not the judge.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

were true and/or that the *Journal's* conduct in determining Thompson's credibility was not a highly unreasonable departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers. *Curtis Publishing Co.*, 388 U.S. at 155, 87 S.Ct. at 1991. From its written answers to the three special interrogatories attached to its verdict, it obviously elected to assign greater credibility to the plaintiff's witnesses and proof. In sum, the jury simply did not believe the defendants' witnesses, its evidentiary presentations or its arguments.

It is apparent from the jury's answer to the first interrogatory that it adopted the plaintiff's proof and Cocozzo's admission in deciding that the *Journal's* November 1st front page article was defamatory. Mindful of the generally accepted rule that false statements do not constitute actionable defamation merely because they are false and that the burden of proof rested upon the plaintiff to demonstrate that the publication was, in fact, defamatory because it tended to injure plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community, or subject him to scorn, ridicule, shame, contempt, or embarrassment, *see Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966), this court seeks direction from the pronouncements of *Washington Post Co. v. Chaloner*, 250 U.S. 290, 293, 39 S.Ct. 448, 448, 63 L.Ed. 987 (1919) (quoting *Commercial Publishing Co. v. Smith*, 149 F. 704, 706 (6th Cir. 1907)), wherein the Supreme Court instructed that a "publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it."⁸ Implicit in the Court's admonition is the

⁸ In *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), cert. denied, — U.S. —, 108 S.Ct. 200, 98 L.Ed.2d 151 (1988), the District of Columbia Circuit purported to apply this standard. *See, e.g.*, 817 F.2d at 775, 780 n.19. However, it would

direction to judge not only the plain text of the publication, but also the composition of the story; its syntax and context; its timing; the prominence the article is accorded by its placement in the paper; the neutral, positive or negative thrust of the article; material factual omissions or distortions; the image of the subject that the publication seeks to project and all other facts that may reflect upon the publisher's intent and purpose to publicly disseminate the information of the article in controversy. Other factors to be scrutinized are conversations between the editor and/or other management personnel with reporters, or the author of the article, concerning the research and development of a controversial story; decisions and reasons relating to selective interviews and selective investigations; the manner of implementing interviews; the importance and veracity of information relied upon in developing the article, always mindful of the caveat that the words of the publication should not be considered in isolation, but rather within the context of the entire article and the thoughts that the article through its structural implications and connotations is calculated to convey to the reader to whom it is addressed.

Considering the November 1st publication in its entirety against the standards enunciated by the Supreme Court, the article was defamatory in its implication that Connaughton was an unethical lawyer and an undesirable candidate for the Hamilton Municipal judgeship who was capable of extortion, who was a liar and an opportunist not fit to hold public office, particularly, a judgeship. Accordingly, this court concludes that the jury's findings of the operational facts as they bear upon the defamatory character of the article here in issue were not clearly erroneous.

appear that the court in fact ignored the standard and instead elected to selectively re-examine the evidence to arrive at what the court itself thought would be a more reasonable interpretation of the facts.

Equally apparent from the jury's answer to the second special interrogatory is that it considered the published Thompson charges to be false. Its finding is understandable in light of the plaintiff's proof which disclosed that the *Journal's* effort to verify her credibility ended in an avalanche of denials by knowledgeable individuals; its inability to produce a single person who supported Thompson's accusations and its apparent decision to deliberately avoid interviewing Stevens.

Moreover, the jury obviously refused to credit the *Journal's* construction of Connaughton's interview of October 31. It accepted Connaughton's express denials of each Thompson charge and considered the significant language interpreted by the *Journal* to constitute his admissions of those charges, when read in context, as nothing more than conjecture elicited by structured questions calculated to evoke speculation. Thus, upon reviewing the record in its entirety, this court concludes that the jury's determinations of the operational facts bearing upon the falsity of the article in issue were not clearly erroneous.

Before addressing the perplexing issue of "actual malice" as it impacts this action, it would, at this juncture of this appellate review, be appropriate for this court to reflect upon the teachings of the Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949. Certiorari was granted in *Bose* "to consider whether the court of appeals erred when it refused to apply the clearly-erroneous standard of Rule 52(a) to the district court's 'finding' of malice." *Id.* at 493, 104 S.Ct. at 1955. The court affirmed the First Circuit's reasoning:

that [the first circuit's] review of the "actual malice" determination was not "limited" to the clearly-erroneous standard of Rule 52(a); instead, it stated that it "must perform a de novo review, independently examining the record to ensure that the district

court has applied properly the governing constitutional law and that the plaintiff had indeed satisfied its burden of proof." It added, however, that it "[was] in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact."

Id. at 492, 104 S.Ct. at 1955 (quoting *Bose*, 692 F.2d 189, 195 (1st Cir. 1982)).⁹

Unfortunately, *Bose* did not explain the scope of its articulated "de novo review," or the extent of "the independent appellate review" and/or the "independent judgment" to be exercised by appellate judges to determine, on an ad hoc basis, if the record on review proves actual malice with convincing clarity. Nor did the decision afford guidance to reviewing courts in resolving the treatment to be accorded factual findings inextricably rooted in credibility assessments resulting from visual observations of a factfinder, either court or jury, manifested during direct or indirect examination of witnesses.

In probing the intent of *Bose*, this court's attention is, in the first instance, attracted to the opinion's discussion of the distinction between the terms "subsidiary facts" and "ultimate fact" and the terms "purely factual findings" and "ultimate factual findings." The "subsidiary facts" alluded to are apparently operative facts that are probative of the background and circumstances which join the substantive issues of the litigation which are developed by testimony of witnesses and other evidence

⁹ The clearly erroneous standard of Rule 52(a) is equally applicable to a jury's factual findings. See *Strauss v. Stratojac Corp.*, 810 F.2d 679, 685 (7th Cir. 1987); *Manufacturers Hanover Trust v. Drysdale Sec. Corp.*, 801 F.2d 13, 27 n.8 (2nd Cir. 1986), cert. denied sub nom. *Arthur Andersen & Co. v. Manufacturers Hanover Trust*, — U.S. —, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987); *Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago*, 700 F.2d 1143, 1156 (7th Cir. 1983).

before the factfinder, either court or jury, and which invoke credibility assessments and determinations.

In contrast, "ultimate facts" or conclusions are defined as those which "more clearly impl[y] the application of standards of law." *Bose*, 466 U.S. at 500 n. 16, 104 S.Ct. at 1959 n. 16. Simply stated, *Bose* distinguished between questions of fact to be resolved by the factfinder, either the court or the jury, applying credibility assessments which come within the purview of the clearly erroneous standard of review and questions of law to be decided by the court.

The *Bose* court framed the issue before it in the following terms:

The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, *must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."*

Id. at 511, 104 S.Ct. at 1965 (emphasis added).

Thus, in determining the issue of "actual malice" within the context of the libel case at bar, this court is called upon to determine if it should apply its independent judgment to each of the subsidiary facts, more appropriately characterized as operative facts, without benefit of credibility assessments, which are probative of the ultimate fact or ultimate dispositive conclusion of actual malice or if it should limit the exercise of its independent judgment to reviewing the jury's factual findings to determine if the totality of those factual findings reflected by the entire record, as a matter of law,

support the jury's ultimate conclusion of clear and convincing proof of actual malice.

Logic and reason dictate that the *Bose* directed de novo review did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but rather was limited to a review of the ultimate conclusion of clear and convincing proof of actual malice. A contrary conclusion would usurp the role of the jury and burden the appellate courts with original jurisdiction in libel actions impinging a plaintiff's constitutional right to a jury trial.¹⁰

The Court of Appeals for the Ninth Circuit in *Guam* directly addressed the manner in which the preliminary facts should be judged to determine if the ultimate conclusion of actual malice is supported by clear and convincing proof. *Guam Fed'n of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 441 (9th Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974). The court concluded that upon appeal a jury finding resolving the conflicting subsidiary or operative facts should be judged by the same rules and accorded the same deference as motions for j.n.o.v., directed verdict or other summary dispositions.¹¹ The court stated:

¹⁰ The rationale of the *Tavoulareas* en banc majority has placed it squarely in the paradoxical position of discarding jury trials in actions for libel thereby denying the plaintiff of his Seventh Amendment right to trial by jury.

¹¹ The majority *Tavoulareas* en banc opinion appears to have evaded the core issue presented by the appeal and refused to address or decide the judicial deference to be accorded a jury's resolution of conflicting facts and credibility assessments.

Mindful of the fact that the appeal resulted from the trial court's grant of j.n.o.v. from a jury verdict in favor of plaintiff, the en banc court afforded no recognition of rudimentary principles applicable to appellate review of summary dispositions. It judged the credibility of witnesses without the opportunity of visual observations, it evaluated both the credibility and weight of the evidence, and denied the plaintiff his entitlement to have the evidence along

[I]n a libel case, as in other cases, the party against whom . . . a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or this court of appeals, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn) but that *neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.*

Guam Fed'n of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 441 (9th Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed. 2d 111 (1974) (emphasis added). The analogy should stimulate little, if any, controversy. In any event, this court subscribes to the logic of the analysis.

The same court elaborated on its previous observations during the following year in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed. 2d 259 (1975):

A district judge on motion for judgment n.o.v., or an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions

with all inferences reasonably drawn therefrom to be viewed in the light most favorable to the plaintiff. The opinion appears to have accorded no deference to the pronouncements of the Supreme Court addressing issues of defamation, falsity, and malice enunciated in *New York Times v. Sullivan* and its progeny; *St. Amant v. Thompson*; *Curtis v. Butts*; *Rose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949; and other milestone decisions that have, over the years, addressed those keystone issues. In sum, the en banc court appears to have intruded into the original jurisdiction of a trial court jury.

of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice.

In turning to the consideration of actual malice in the instant case, this court must, from an examination of the record, first determine if the jury's resolution of the subsidiary or operative facts was clearly erroneous; that is, if, after reviewing the entire evidence, the reviewing court was left with the definite firm conviction that a mistake had been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

A review of the entire record of the instant case disclosed substantial probative evidence from which a jury could have concluded (1) that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the *Journal* Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolan from the *Journal* as compared with the equally consistently unfavorable news coverage afforded Connaughton; (2) that the *Journal* was engaged in a bitter rivalry with the *Cincinnati Enquirer* for domination of the greater Hamilton circulation market as evidenced by Blount's vituperous public statements and criticism of the *Enquirer*; (3) that the *Enquirer's* initial expose of the questionable operation of the Dolan court was a high profile news attraction of great public interest and notoriety that had "scooped" the *Journal* and by Blount's own admission was the most significant story impacting the Connaughton-Dolan campaign, (4) that by discrediting Connaughton the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area; (5) that Thompson's emotional instability coupled with her obviously vindictive and antagonistic

onistic attitudes toward Connaughton as displayed during an interview on October 27, 1983, arranged by Billy New's defense attorney, afforded the *Journal* an ideal vehicle to accomplish its objectives; (6) that the *Journal* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition; (7) that every witness interviewed by *Journal* reporters discredited Thompson's accusations; (8) that the *Journal* intentionally avoided interviewing Stephens between October 27, 1983, the date of its initial meeting with Thompson, and November 1, 1983 when it printed its first story even though it knew that Stephens could either credit or discredit Thompson's statements; (9) that the *Journal* knew that publication of Thompson's allegations charging Connaughton with unethical conduct and criminal extortion and her other equally damaging statements would completely discredit and irreparably damage Connaughton personally, professionally and politically; (10) that its prepublication legal review was a sham; (11) that the *Journal* timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*.

Having considered the subsidiary or operative facts as reflected in the entire record of the evidence and assigning "due regard" to the jury's opportunity to observe the demeanor of the witnesses, and mindful of the trial court's model instruction to the jury advising it that the burden rested upon the plaintiff to prove the element of actual malice by clear and convincing evidence coupled with the clear, concise and simple definition of that term incorporated into the instructions, this reviewing court is unable to conclude that it "is left with a definite and firm conviction that a mistake has been committed" by the jury in arriving at its subsidiary

factual findings. *United States v. United States Gypsum Co.*, 333 U.S. at 395, 68 S.Ct. at 542. Accordingly this court concludes that the jury's finding of the operative facts as reflected by the entire record of the evidence are not clearly erroneous.

Having decided that the jury's findings were not clearly erroneous, this appellate review proceeds to implement the teachings of *New York Times v. Sullivan* and *Bose Corp. v. Consumers Union of United States, Inc.* by conducting its independent review of the entire record to correct errors of law, including those that may have infected so called mixed findings of law and fact, or findings of fact that are predicated on a misunderstanding of a governing rule of law, if any exist, and to determine the ultimate conclusion of federal constitutional law, namely, whether the evidence reflected by the entire record in this defamation action is of the *convincing clarity* required to strip the publisher of First Amendment protection.

The Supreme Court in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) charted this court's course to resolution of its quest in the following passage:

Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no constitutional value in false statements of fact."

* * *

Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of

erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.

Lando, 441 U.S. at 171-72, 99 S.Ct. at 1646 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974)).

Apparent from the above language, a plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence.

Appreciative of the antithesis between freedom of speech and the elements of libel, which limit a publisher's freedom to express certain sentiments, at least, without guaranteeing some legal proof of their accuracy this court is, nevertheless, legally committed to existing legal precedent that, in cases involving materials and persons commanding justified and important interest, a finding of falsity alone will not and should not strip the publisher of First Amendment protections. *Curtis Publishing Co. v. Butts*, 388 U.S. at 152, 87 S.Ct. at 1990.

In the instant case it is conceded that although not a public official, Connaughton was a public figure. Aware of this concession, this court's attention is directed to the expressions addressing the rigorous constitutional requirements appropriate to accommodate the conflicting interests between freedom of press and defamation.

In *Curtis Publishing Co. v. Butts*, the Supreme Court accorded public figures as well as public officials recovery of damages for the publication of "defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 155, 87 S.Ct. at 1991.

Adopting the premises that *Bose* mandated an independent appellate review of the jury's findings resolving the ultimate fact or conclusion of "actual malice" but did not require a de novo assessment of each and every subsidiary or operative fact which supported the factfinder's disposition of the constitutional issue; and this court, having accepted the jury's findings of the subsidiary or operative facts that bear upon the issue of "actual malice" as those facts are mirrored by the record in its entirety; and having evaluated those factual findings and all reasonable inferences arising therefrom, including assessments of credibility in favor of the plaintiff, this appellate review undertakes an overview or "second look" of the entire record preliminary to the exercise of its independent judgment to determine if the proof as found by the jury supporting "actual malice" is, as a matter of law, convincingly clear.

Thus, for liability to attach in an action for libel, the alleged defamer of a public figure must know or have reason to suspect that its publication is false. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) advises that "[u]nder this rule, absent knowing falsehood, liability requires proof of reckless disregard for the truth, that is, that the defendant 'in fact entertained serious doubts as to the truth of his publication.' . . . Such 'subjective awareness of probable falsity' . . . may be found if 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports' . . . or 'equally significant, to prefer the veracity of one source over another.'" *Id.* at 156-57, 99 S.Ct. at 1639 (citations omitted); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6, 94 S.Ct. 2997, 3004 n.6, 41 L.Ed.2d 789 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). *Lando* also affords guidance in identifying the type of substantive evidence that offers assistance to a reviewing court in exercising its independent judgment to deter-

mine if the evidence bearing upon the constitutional issue of actual malice is sufficiently clear and convincing to support the verdict. *Lando*, 441 U.S. at 160 n.6, 99 S.Ct. at 1641 n.6. In *Lando*, the Court teaches that the presence or absence of motive and/or other circumstances as heretofore discussed for publication of the article may reflect upon the publisher's intent and purpose to publicly disseminate the article in controversy.

Because of the striking factual similarity between the instant case and *Curtis Publishing Co. v. Butts*, this court's mission is, to a degree, simplified. In *Butts*, the Saturday Evening Post (Post) published a defamatory article which accused Wallace Butts, a highly respected athletic director and former coach at the University of Georgia and a nationally recognized figure in coaching ranks, of conspiring to "fix" a football game between the University of Georgia and the University of Alabama played in 1962. As in the instant case, the Post in *Curtis* was confronted with a highly questionable primary information source named Burnett, who was on probation in connection with bad check charges, and whose credibility was a serious issue. The Post, although recognizing the need for a thorough investigation of the charges against Butts, ignored elementary precautions inherent to standards of investigation and reporting ordinarily adhered to by responsible publications, and published the Butts article on the basis of Burnett's affidavit without substantial independent support.

As in *Curtis*, the Connaughton front page story of November 1st was not "hot news" in that it necessitated meeting a publication deadline. Publication could have been withheld until a later date to accommodate a thorough investigation of credibility implications of the magnitude presented by Thompson's accusations which were of conspicuous concern to Cocozzo, the publisher, Blount, the editorial director, and Walker, the editor of the *Journal*, unless of course the November 1st publica-

tion date was critical to the timing of the *Journal's* campaign to further the election of its candidate Dolan by discrediting Connaughton before the forthcoming election and thereby fortifying its reputation within its circulation area as the dominant respected and influential image maker to the detriment of the *Enquirer*. As in *Curtis*, wherein the Post was anxious to change its image by instituting a policy of "sophisticated muckraking" in an effort to become more competitive in order to enhance its circulation, in the present case, the jury could have found that the *Journal* was motivated to publish the controversial article by its efforts to establish its preeminence in reporting political news in order to further its competitive position vis-a-vis the *Enquirer* in the greater Hamilton County geographical area through the advancement of Dolan's candidacy. As in *Curtis*, confronted with vital concerns about the credibility of its sole information source, the *Journal* ignored elementary precautions and demonstrated highly unreasonable conduct which constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers by the publication of the November 1st article based solely upon the Thompson statements without substantial independent support.

Having considered the evidence bearing on the subsidiary factual issues in the light most favorable to the jury findings and having defined and considered the subsidiary facts developed by the probative evidence adduced at trial, this court in the exercise of its independent judgment determines that the probative facts considered cumulatively are clear and convincing in nature, and therefore are legally sufficient to support the jury's resolution of the dispositive conclusions as reflected in its special verdict. Weighing the cumulative impact of the subsidiary facts enumerated above, this court concludes that Connaughton proved, by clear and convincing evidence, that the *Journal* demonstrated its actual malice

when it published the November 1, 1983 article despite the existence of serious doubt which attached to Thompson's veracity and the accuracy of her reports. See *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968).

"It is well established that evidence that a publisher failed to investigate does not, *by itself*, prove actual malice." *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (emphasis added) (citing *St. Amant*, 390 U.S. at 732-33, 88 S.Ct. at 1326); see also *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 918 (6th Cir. 1982). Although the *Journal* attempted to characterize its failure to contact Stephens as an act of negligence that was insufficient to establish actual malice, its failure to interview her must be considered in conjunction with other direct and circumstantial evidence bearing on the issue of "actual malice." As previously discussed herein, the evidence adduced at trial demonstrated that the *Journal* was motivated to publicize Thompson's allegations, not only by a desire to establish its preeminence in the reporting of Hamilton political news, but also by a desire to aid the Dolan campaign. Prior to publishing the November 1, 1983 article, the *Journal* was aware that Thompson had been antagonized by the public notoriety of her involvement in the New bribery controversy and had been reproached by her peers as a "snitch" and a "rat," all of which she resented and attributed to Connaughton; that Thompson had a history of emotional and psychiatric instabilities for which she had been treated professionally; that her allegations had been discredited by every witness to the September 17, 1983 and subsequent meetings who had been contacted by the newspaper's staff; that the *Journal* had no independent affirmative support for her accusations; and that Stevens as the key witness to New's indictment could either have credited or discredited her sister's statements and could have attested to her emotional and psychiatric instability

and professional treatment; nevertheless, it published the November 1 article. Accordingly, this court concludes that the *Journal's* decision to rely on Thompson's highly questionable and condemning allegations without first verifying those accusations through her sister, Stevens, and without independent supporting evidence constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers which demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of "actual malice" as found by the jury. *Butts*, 388 U.S. at 153, 87 S.Ct. at 1991; see also *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1003 (S.D.N.Y. 1983) (Failure to investigate or reliance on a questionable source "may tend to show that a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his source.").

This court also concludes that the defendants' reliance upon the limited doctrine of "neutral reportage" is misconceived and is therefore rejected because the "reportage" in the case at bar was neither accurate nor disinterested as reflected by the record. The scope of the privilege is severely limited to ensure that the media is not granted "absolute immunity to espouse and concur in the most unwarranted attacks . . . made by persons known to be of scant reliability." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 69-70 (2nd Cir. 1980). Clearly, "a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage' but rather 'assumes responsibility for the underlying accusations.'" *Id.* at 68 (quoting *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2nd Cir.), cert. denied, 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977)).

Finally, the *Journal* asserted that the constitutional privilege for expressions of opinion protected the statement that "Thompson said she believes that Connaughton, a candidate for municipal court judge, used 'dirty tricks' in obtaining her cooperation with his personal investigation of New." It argued that the conclusion that Connaughton was guilty of "dirty tricks" represented Thompson's personal opinions of Connaughton's actions. However, "[o]pinions based on false facts are actionable . . . against a defendant who had knowledge of the falsity or probable falsity of the underlying facts." *Davis v. Ross*, 754 F.2d 80, 86 (2nd Cir. 1985) (quoting *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2nd Cir.), cert. denied sub nom. *A.E. Hotchner v. Doubleday & Co.*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977)); accord *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 65 (2nd Cir. 1980); see also *Lewis v. Time Inc.*, 710 F.2d 549, 554 (9th Cir. 1983). Thompson's claim that Connaughton resorted to "dirty tricks" to induce her statements was based upon the false factual assertions that Connaughton had offered Thompson jobs, trips and anonymity. Because the *Journal* had obvious reasons to doubt the truth of those underlying facts, the references to "dirty tricks" were not constitutionally protected statements of opinion.

For the reasons stated above, the judgment of the district court is hereby AFFIRMED.

APPENDIX A

MUNICIPAL COURT RACE WILL HAVE MORE THAN ONE LOSER

EDITOR'S NOTEBOOK

By Jim Blount

There will be more than one loser in the heated Hamilton Municipal Court contest between Judge James H. Dolan and challenger Daniel E. Connaughton.

One person will emerge from the Nov. 8 election as the winner of a six-year term on the court which serves the City of Hamilton and two neighboring townships, Ross and St. Clair.

But in the campaign debris will be more than a dejected candidate and a handful of disappointed campaign workers.

The Dolan-Connaughton battle has been all it was expected to be and more—and there is still more than a week before voters will have to go to the polls to make a choice. A lot could happen in the next eight to nine days.

ACCORDING to our recent observations, most voters consider it a tough decision—and getting tougher.

Last week's array of charges and counter charges probably has taken some votes from Dolan. But it isn't certain if it has boosted Connaughton's prestige.

It is certain, as the verbal firing continues, that more and more people will register their disgust and confusion with both men by refusing to vote for either candidate.

As the heat increases, it also appears most voters want to be sure they will support the most honorable and clean-

est candidate, not just the one with the most appealing face, the most familiar name, the most advertising or the most votes.

As one voter remarked, "I want to be sure that my vote won't be discredited by something that happens after the election is over."

Another said "I don't mind voting for people I know may lose an election, but I resent voting for a person who I later find has been deceitful or dishonest in campaigning."

Both comments came from persons who said they hadn't made a decision on the Hamilton Municipal Court candidates.

COMPLICATING the campaign are the bribery charges pending against Billy New, a former court employee.

Of course, it should be emphasized that New hasn't been tried, and that a person is presumed innocent until proven guilty. It also should be stressed that New hasn't been indicted. In fact, his case hasn't been weighed by a grand jury.

A Butler County grand jury is scheduled to begin hearing the New case Monday—which highlights some of the other potential losers in the Dolan-Connaughton scrap.

Whatever the outcome of the grand jury, more persons are likely to come under suspicion because of the intensity of the judicial campaign and the nearness of the election.

Those potential losers are Butler County prosecutor John Holcomb and the individual members of the grand jury.

Holcomb already has been attacked for (1) delaying the grand jury, (2) moving it up, (3) refusing to handle the New case in a special manner, or (4) all of the above,

depending on the policies of the person rating his performance.

Although Holcomb understands that criticism and doubt come with the job, he also is aware that his handling of the case could become an issue in his own re-election campaign next year.

Consider these possibilities, all adverse to Holcomb:

- The grand jury indicts New. In the trial after the election, New is found guilty. If Connaughton loses the election, then later he could claim that Dolan's candidacy was aided by the timing, and that if the case had been expedited that the election outcome would have been different.

- The grand jury indicts New. In the trial after the election, New is acquitted. If Dolan loses, then later he could charge that Connaughton's victory had been because of the frivolous charges against New, which also damaged the judge's reputation. Dolan could argue that he would still be the judge if the matter had been resolved before Nov. 8.

ANOTHER potential loser is the media—especially the *Journal-News* and the *Cincinnati Enquirer*.

Stories on the Dolan-Connaughton fight in the *Enquirer* last week certainly helped to fuel the fire.

But in the process, the motives and credibility of the *Cincinnati* newspaper also are in question.

Some observers are asking how the *Enquirer* can justify the placement of a story critical of Dolan at the top of page one Thursday morning, Oct. 27, two days after U.S. forces participated in the invasion of Grenada, a day after the legality and necessity of the military action was questioned or condemned by some members of Congress and U.S. allies, and while the nation was still angered by the deaths of more than 225 U.S. Marines in a terrorist explosion last Sunday.

Judge Dolan suggested an answer when he charged Jim Delaney, an *Enquirer* editor, with threatening a page one smear Thursday morning if the judge didn't cooperate with the newspaper and its reporter (Karen Garioch), and if the judge didn't cancel a press conference, open to all media, scheduled for Thursday afternoon.

Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-makers.

MEANWHILE, the dilemma facing the *Journal-News* is what to do about an endorsement in the Dolan-Connaughton race.

Should the newspaper play it safe and skip an endorsement for fear that post-election disclosures could embarrass or discredit the newspaper?

Or, should a *Journal-News* editorial simply remind voters, as was mentioned earlier, that everyone is innocent until proven guilty and that, in fact, there are no charges pending against the judge?

But taking a safe, self-serving course would be shirking a responsibility held sacred by this newspaper.

OF COURSE, the big loser—almost regardless of the outcome—is likely to be the court and the entire judicial system.

Connaughton, in seeking election, has raised some interesting questions about the conduct of the court.

And, in defending his six years on the bench, Dolan has countered with some points which, while to his favor, also expose some potential faults in the system.

TO SALVAGE something positive out of this campaign, perhaps there should be a resolve to take a close look at the local system of justice.

This would not be a sensational expose focusing on personalities and politics, but on the system itself.

Instead, it would be a calm probe searching for shortcomings and potential trouble spots in procedures, policies, existing laws, etc., which, regardless of the capabilities of the judges, interfere with justice.

The only question would be: "What changes are necessary if the judicial system is to work with efficiency and with fairness?"

Unfortunately, that can't be done before Tuesday, Nov. 8.

RALPH B. GUY, Jr., Circuit Judge, dissenting.

An independent review of the entire record in this case leads me to the inexorable conclusion that plaintiff failed to prove the existence of "actual malice," i.e., reckless disregard of the truth, by clear and convincing evidence. Therefore, I must respectfully dissent.

I.

The majority opinion sets forth a lengthy recitation of the factual background of this case. There are, however, two glaring omissions which I believe are critical to the proper resolution of the actual malice issue.¹ First, the majority neglects to quote the exact language of the allegedly defamatory article. Second, the majority opinion does not adequately address the admissions made by the plaintiff during the course of an interview with the defendant, *Journal-News*. This interview was conducted prior to the publication of the article and the excerpts

¹ There is one further omission which is not directly relevant to the disposition of this appeal but, nevertheless, bears mentioning. In all fairness to Judge Dolan, it should be noted that he was cleared by a grand jury of any wrongdoing in connection with the indictment and conviction of his court administrator.

reveal that plaintiff essentially confirmed the substance of the factual allegations which subsequently appeared in the article.

When the article is read in light of the plaintiff's undisputed, pre-publication admissions to the *Journal-News*, it becomes abundantly clear that the plaintiff could not show that the *Journal-News* had printed the story in "reckless disregard of the truth" as is required by the actual malice standard. Moreover, I submit that the plaintiff could not have made the requisite showing of actual malice at trial under any standard of proof, let alone the rigorous "clear and convincing evidence" standard which applies in this case. Finally, I believe reversal is required even under the narrow scope of appellate review utilized by the majority.

A. The Article

The majority opinion provides only a generalized description of the allegedly libelous article stating that "Thompson's charges branded Connaughton as a liar, an extortionist, an unethical opportunist who was waging [a] 'deceitful' and 'dishonest' and generally 'dirty' campaign. . . ." At 834. I believe that the proper analysis of the issues before us requires a more detailed account of the exact language which appeared in the article. The article which precipitated this case was printed beneath a headline which read, "Bribery Case Witness Claims Jobs, Trip Offered."² The following excerpts are quoted from the article:

A woman called to testify before the Butler County Grand Jury in the Billy Joe New bribery case claims Dan Connaughton, candidate for Hamilton Municipal Judge, offered her and her sister jobs and a trip to Florida "in appreciation" for their help.

² A copy of the entire article appears in an appendix attached to this dissent.

Alice Thompson, 22, 1740 Shuler Ave., was scheduled to testify before the grand jury in relation to the charges against New, who resigned his court position Sept. 22.

Thompson said she believes Dan Connaughton, a candidate for municipal judge, used "dirty tricks" in obtaining her cooperation with his personal investigation of New.

Connaughton, in an interview with the *Journal-News* Monday, confirmed meeting with Thompson.

But he denied any wrongdoing and said Thompson misinterpreted comments and discussion while attending meetings with him and persons involved in his campaign who were gathering information about New and Dolan.

....

Thompson said her reason for wanting to talk to the *Journal-News* were: 1. To let people know she did not "snitch" on New. 2. To reveal the "dirty tricks" Connaughton pulled to get her to make a statement.

She said two other things bothered her about Connaughton's actions: (1) he did not protect her anonymity as promised and (2) he allowed other people to hear tapes of a session with Connaughton and other supporters about what happened with New during Thompson's recent appearances in Hamilton Municipal Court.

Connaughton and some of his supporters and two neighbors were contacted by the *Journal-News* Monday to obtain their recollections of the meetings and conversation.

They claim there was never a direct offer to Alice Thompson and her sister Patsy Faye Stephens, 1757 Shuler Ave., Hamilton.

Connaughton did admit there was talk about the two sisters working in an ice cream shop the Connaughtons might open.

....

Thompson claims the tapes were turned off and on during a session she claims lasted until 5:30 a.m. When the tape was turned off, she said Connaughton made promises about a job and a post-election trip to Florida for Thompson and Stephens which the Connaughton family was going to take.

The Barnes claim the tapes ran continuously.

Dan Connaughton said there were times when the tapes were stopped.

Thompson said that either at that second meeting or a subsequent third meeting Connaughton offered:

- . a job for Thompson in appreciation for her help with Connaughton's investigation of Billy New and Judge Dolan.

- . a municipal court job for Stephens.

- . an invitation for Thompson and her sister to go on a post-election trip to Florida with Connaughton and his family.

- . to set up Thompson's parents, Zella and Brownie Breedlove, in the restaurant business at the location of Walt's Chambers, which Connaughton owns and leases.

....

Connaughton and his supporters claim no promises were made.

Connaughton said he suggested the two sisters may want to go South.

Connaughton said his wife had thought about opening a gourmet ice cream shop at the Walt's Chambers location.

....

Thompson claimed that Connaughton promised a post-election dinner at the Maisonette in downtown Cincinnati.

Connaughton said "it may have been discussed. I wouldn't say it wasn't discussed."

Thompson claimed Connaughton had told her the tapes he made of her and her sister's statement Sept. 16 or Sept. 17 were to be presented to Dolan.

Thompson said Connaughton hoped to get New and Dolan to resign and then to have himself appointed as municipal judge.

Plaintiff claimed that the following allegations were false and defamatory: (1) that he had threatened to confront Judge Dolan with the taped allegations of the informants in order to force his resignation; (2) that he had promised the informants that they would remain anonymous; (3) that he had promised the jobs, a trip to Florida, and an expensive dinner "in appreciation" for their cooperation; and (4) that he had used "dirty tricks" to obtain their cooperation.

B. *The Connaughton Interview*

Prior to the publication of the foregoing article, the *Journal-News* arranged an interview with plaintiff in order to confirm Ms. Thompson's allegations. I find the transcript of the interview to be very revealing with respect to the issue of actual malice.

1. *Allegation that Plaintiff had Intended to Confront Judge Dolan With the Tape Recorded Accusations*

Q. Did you ever say—tell Alice that your purpose was to collect the evidence, present the informa-

tion to Dolan, get New and Dolan to resign, and then for you to be appointed to that post?

A. That I would present what I had to them . . .

Q. Yeah, you'd get what you . . .

A. And then they would resign and I would be appointed?

Q. Yeah. Or that your intention was to try to—at least—at the very least confront them with the information—was that your intention at all? I mean, in interviewing these people, was to confront Dolan with this?

A. Well, I don't know that I had a firm purpose prior to hearing what they had to say, what I was going to do with the information once I got it. I think it would be fair to say, sometime during those three or four hours that they were there, that I probably made a remark along the lines that I just can't believe what I'm hearing, and, you know, I would think if they could hear what we're hearing, they would probably resign. I mean, I thought the allegation was that serious. But to tell her that—to answer that—and if she's saying that was my announced purpose of what I had them there for and what we were going to do with the information, my answer would be no.

MR. BLOUNT: You didn't tell her you were going to take the tapes to him? and play them for them?

A. No. No. What I might have said is, boy, I'd sure like to let them hear these tapes and see what they've got to say for themselves, you know, in a fashion such as that.

MR. BLOUNT: In an expression of shock.

MR. CONNAUGHTON: Yeah, Yeah, as I almost fell off of the fireplace. Right.

....

[MR. BLOUNT] But to get back to the question on the deal about New and Dolan's resignation—was

it ever your intention, either during this interview or subsequent to it, to use the tapes as an attempt to get New and Dolan to resign?

A. I can only answer this way. After hearing it all, I knew it would be an unrealistic approach, you know, to go down to their office and say do you gentlemen have about an hour, I'd like for you to listen to something, and then saying, oh, well, okay, if you want to accept our resignations, you know, we quit. And you know, that was absolutely impractical and would not apply. I do not deny that during the course of saying a lot of things in total shock and wondering what in the world we were ever going to do with something that was dynamite, I probably said something like yeah, I'd like to go down there and let them hear this and see what they've got to say about it, you know.

Q. As far as the resignation though?

A. Well, I probably would have put an add-on and said, you know, Goddamn, after they hear this they ought to just resign and quit, or something, you know, in that kind of a setting and expression.

2. *Alleged Promise of Anonymity for the Informants*

Q. Did you ever promise Alice Thompson anonymity?

A. That question was discussed, and I was hoping [sic] to her, and I told her it would be my intention and hope that she could remain anonymous, yes. But did I promise her anonymity, the answer would be no. Did we discuss it, we sure did, and I expressed to her my desire as well as her desire that she could remain anonymous.

Q. Do you think that she felt that that was a promise? Did she ever refer to it later, as, you know, well I, you know, I . . .

A. I imagine she feels betrayed.

Q. And why would that be?

A. Because she's not anonymous, and she probably felt that my representation, that maybe she could remain anonymous had been a breach of trust to her.

3. *Alleged Job Offer*

Q. Did you ever talk to Alice about getting a job for her in appreciation for her help with your investigation of New and Dolan?

A. No.

Q. Not a waitress job?

A. No.

Q. Did you promise a Municipal Court job for her sister Patsy Stephens?

A. No.

Q. Did you offer to have "the sisters go on a post election trip to Florida with you and your family to stay in a condominium"?

A. No.

Q. Did you offer to set up Thompson's parents, the Breedloves, in what is now Walt's Chambers, which you own and lease?

A. Absolutely not.

Q. Why would she say this to us?

A. What was discussed in an offhanded way, the people who own that bar, who we're not very pleased with; their lease expires next September. My wife has the idea that she wants to open an ice cream type shop like Graeters, or some such thing as that, and I heard her discussing with them that maybe, since Patty had run this Homette Restaurant or something of that nature, that maybe she would help out and participate in the operation of this—whatever you want to call it—deli shop or gourmet ice cream shop. Yes, and I was present when that took place.

Q. And when was that?

A. Well, I don't think it was that night. As I recall, this was a later time that we had seen them.

Q. But that would only by [sic] for Patty (unclear)?

Q. I guess Alice was there, and the offer may have been extended to her in that fashion, that she could work there or something—I wouldn't be surprised if that was said.

4. *Alleged Promise of a Florida Trip*

Q. What about this post-election trip to Florida? Is there any possibility that they were, in an off-hand way, well, you know, you guys want to go, you know, you can go along, or something like that?

MR. BLOUNT: Did you talk about anything like that?

A. Ummm-hmmm. After getting over the initial shock it became a little clearer to me of—kind of how scary this thing was with the information they gave to us, as far as, if their personal safety was at stake, and before this ripened into a police matter officially where they might get protection if that would be required, I do remember in an off-handed way it being discussed or some thing that they ought to . . . they could go down to Hilton Head or Florida, or something like that, or maybe hide out or something like that, I don't know. But I own no property and have nothing to offer them. . . .

5. *Alleged Promise of Expensive Dinner*

Q. One last statement. At lunch Thompson said that you promised to take her and her sister out to a post election victory dinner at the Maisonette.

A. I promised to take them to the Maisonette? Hell, I haven't been to the Maisonette for years.

MR. BLOUNT: Was it discussed? Was it brought up?

A. It may have been. It may have been. I won't deny that some loose discussion in a kidding way was . . .

MR. BLOUNT: Did you compare Bob Evans with the Maisonette?

A. No, we didn't make those comparisons, but if she said that was discussed, I wouldn't say that she was not telling the truth. If she says that I made a firm statement that we were going to definitely plan a party at the Maisonette, that's not true.

II.

Plaintiff's responses set forth above confirmed the fact that the subject of jobs, vacations, and dinners, had been discussed with the informants. Likewise, plaintiff admitted that he had expressed his "hope" and his "intention" to protect Ms. Thompson's anonymity. Plaintiff also admitted that he had discussed the possibility of playing the taped September 17 interview for Judge Dolan. Thus, I believe that the pre-publication interview of the plaintiff conducted by the *Journal-News*, confirmed the factual basis of Ms. Thompson's allegations.

It would be difficult if not impossible for the *Journal-News* to conclusively determine whether Ms. Thompson was justified in construing the plaintiff's statements as "promises." This is more a question of interpretation than one of fact. I believe that the allegations made by Ms. Thompson (and reported virtually verbatim by the *Journal-News*) "amounted to the adoption of one of a number of possible rational interpretations of a document [in this case a discussion] that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New*

York Times." *Time, Inc. v. Pape*, 401 U.S. 279, 290, 91 S.Ct. 633, 639, 28 L.Ed.2d 45 (1971).

It should also be noted that the *Journal-News* reported plaintiff's contention that Ms. Thompson had misinterpreted his statements. Moreover, plaintiff's position was set forth in the fifth sentence of the article, thereby alerting readers to the conflicting viewpoints. The article also revealed that plaintiff's supporters who had attended the September 17 meeting stated that plaintiff had not made any "direct offers" to the informants. Basically, the article presented two versions of a discussion which admittedly took place and allowed the readers to draw their own conclusions as to which version was more accurate.

The majority opinion discounts the statements made by the plaintiff during the course of his pre-publication interview with the *Journal-News*. At one point the majority states, "Connaughton's answers to these questions are a matter of record and, when read in context, do not support the *Journal-News*' conclusions that he admitted to any of the Thompson charges which he had unequivocally denied during the early stages of the interview." At 836. It is precisely because Connaughton's statements "are a matter of record" that this court is obliged to consider them in determining whether the judgment against the *Journal-News* is contrary to the first amendment. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964) (an appellate court "must make an independent examination of the whole record, so as to [insure] that the judgment does not constitute a forbidden intrusion on the field of free expression.") (emphasis added) (citation omitted).

Elsewhere in its opinion, the majority states:

Moreover, the jury obviously refused to credit the *Journal's* construction of Connaughton's interview of October 31. It accepted Connaughton's express

denials of each Thompson charge and considered the significant language interpreted by the *Journal* to constitute his admissions of those charges, when read in context, as nothing more than conjecture elicited by structured questions calculated to evoke speculation. Thus, upon reviewing the record in its entirety, this court concludes that the jury's determinations of the operational facts bearing upon the falsity of the article in issue were not clearly erroneous.

At 841.³

I cannot join in the cavalier manner in which the majority dismisses these undisputed factual statements made by the plaintiff. Admittedly, plaintiff initially denied the general allegations made by Ms. Thompson; however, he then promptly contradicted himself by admitting that each of these matters had been discussed. I have quoted extensively from the transcript of plaintiff's interview in order to show that his statements were not taken out of context, nor can they be construed as mere "speculation." Rather, they provided ample basis for the *Journal-News* to conclude that Ms. Thompson's allegations were substantially true. Plaintiff did not deny the fact that such discussions had taken place; he merely suggested that Ms. Thompson had "misinterpreted" his comments. This is the way in which it was reported in the November article. Given these undisputed facts, I cannot agree with the majority's conclusion that the *Journal-News* printed Ms. Thompson's allegations with a

³ Because I believe that plaintiff has utterly failed to prove actual malice by clear and convincing evidence, I find it unnecessary to analyze whether he proved the requisite elements of falsity and defamation by a preponderance of the evidence. I find it ironic, however, that in order to find the allegations contained in the article were false, the jury would not only have to discredit Ms. Thompson's testimony, but also discredit some of the statements made by the plaintiff himself when he admitted that the subjects had been discussed.

"high degree of awareness of . . . probable falsity." See *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (citations omitted).

III.

A substantial portion of the majority opinion is devoted to the analysis of the proper standard of appellate review of a finding of "actual malice." Specifically, the majority has attempted to resolve the conflict which it perceives is created by the Supreme Court's opinion in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), wherein the Court squarely held:

We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

Id. at 514, 104 S.Ct. at 1967. The majority found that a broad reading of the Court's holding in *Bose* would conflict with the mandate of Fed.R.Civ.P. 52(a) which dictates that "findings of fact shall not be set aside unless clearly erroneous" The majority also expressed the opinion that if an appellate court engaged in *de novo* review of factual findings, it would "impinge" on a plaintiff's constitutional right to a jury trial as guaranteed by the seventh amendment. Therefore, the majority has attempted to reconcile this conflict by stating:

Logic and reason dictate that the *Bose* directed *de novo* review did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but rather was limited

to a review of the ultimate conclusion of clear and convincing proof of actual malice.

At 842.

Admittedly, the majority opinion in *Bose* is somewhat confusing; nevertheless, I do not believe that a fair reading of that opinion can support the extremely narrow construction which it is given by the majority.⁴ Therefore, since *Bose* cannot be distinguished on its facts, I believe this court is bound by the Supreme Court's pronouncements in that case regardless of whether we agree or disagree with the Supreme Court's method of analysis.

Moreover, I do not believe that this case requires us to determine whether or not the *de novo* review standard announced in *Bose* extends to determinations of credibility made by a jury. It is *undisputed* that the plaintiff made the statements from which quoted in Part I of my dissent. Given these statements, I would find, as a matter of law, that plaintiff failed to prove actual malice by clear and convincing evidence. Therefore, I would refrain from attempting to resolve the admittedly difficult issues posed by the *Bose* opinion since it is not necessary to the resolution of the instant case. The Sixth Circuit has not yet had occasion to rule on these issues and I would prefer to wait for a case in which they are squarely presented.

⁴ The Supreme Court's decision in *Bose* has generated a great deal of controversy in academic circles and has spawned several law review articles, most of which are critical of the Court's reasoning. See, e.g., Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corp. v. Consumers Union*, 8 Hamline L. Rev. (1985); Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985); Note, *The Failure of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 Cornell L. Rev. 477 (1986); Comment, *The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 Mercer L. Rev. 711 (1985).

Even if I were to agree that this court should adopt the circumscribed reading of *Bose* proposed by the majority in the instant case, I still could not concur in its judgment. The majority sets forth eleven "subsidiary or operative facts" which the jury could have found from the evidence presented at trial. At 843. The majority infers these conclusions from the jury's finding of "actual malice" in the general verdict. Under the majority's interpretation of the proper standard of appellate review, we are bound to accept these inferred conclusions as true unless they are "clearly erroneous."

These eleven conclusions can be summarized in five general categories: (1) the *Journal-News* had a motive to publish sensational falsehoods about the plaintiff because it supported his opponent in the upcoming election and because it hoped that such stories would boost its circulation; (2) Ms. Thompson was an unreliable source given her emotional instability; (3) Other witnesses present at the meetings between Thompson and Connaughton discredited her accusations; (4) The *Journal-News* "intentionally" avoided interviewing a key witness; and (5) the *Journal-News* printed Ms. Thompson's allegations with the knowledge that plaintiff would be harmed "personally, professionally, and politically." The majority found that these possible conclusions were not clearly erroneous and therefore must be taken as true. Purporting to apply a *de novo* review of the "ultimate fact," i.e., actual malice, the majority concluded that given the existence of these "subsidiary facts" the plaintiff had demonstrated by clear and convincing evidence that the *Journal-News* had published Ms. Thompson's allegations despite serious doubt as to their truth. At 844.

Even if these speculative "subsidiary" factual findings were the only evidence before this court, I would be hesitant to agree that they constitute "clear and convincing evidence" of a reckless disregard of the truth.

First, with respect to the "finding" that the editorial staff sought to defeat plaintiff's campaign by discrediting him, this alone does not support a finding of actual malice. See, e.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 281-82, 94 S.Ct. 2770, 2779-80, 41 L.Ed.2d 745 ("[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.") (citations omitted). Admittedly, the existence of a subjective dislike may be relevant to the issue of motive; however, the plaintiff must show more than an "intent to inflict harm"; he must show an "intent to inflict harm through falsehood." *Henry v. Collins*, 380 U.S. 356, 357, 85 S.Ct. 992, 993, 13 L.Ed.2d 892 (1965). The phrase "actual malice" is a legal term of art which is defined as the publication of a statement "with knowledge of its falsity or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 726. It seems to me that the majority may have equated the term "actual malice" with "animosity" or "antipathy" rather than its technical legal definition. Nor is the "fact" that the *Journal-News* sought to increase its circulation conclusive evidence of "actual malice." Once again, this only relates to motive and is not particularly probative, since I presume that all newspapers seek to increase their market share by publishing newsworthy stories.

Second, despite Ms. Thompson's history of personal problems, her allegations were not inherently unbelievable and were entirely plausible in light of the preceding events which were known to the editors and reporters of the *Journal-News*. Nor is the fact that her allegations were "contradicted" by several other witnesses necessarily determinative. These witnesses were avowed supporters of the plaintiff and the fact that none of them claimed to have heard plaintiff make any offers does not disprove Thompson's allegations since she claimed that at least some of the "promises" were made privately off the record.

Third, the majority relies heavily on the "subsidiary" fact that the *Journal-News* "intentionally" failed to interview a key witness, Patsy Stephens, Ms. Thompson's co-informant who could have confirmed or discredited Thompson's allegations. It is well established, however, that the failure to investigate does not in itself establish actual malice. *St. Amant*, 390 U.S. at 733, 88 S.Ct. at 1326. In *Schultz v. Newsweek*, 668 F.2d 911 (6th Cir. 1982), this court stated that "unless there is a showing of actual doubt concerning the truth of the statements, mere evidence of incomplete investigation is insufficient to show actual malice." 668 F.2d at 918. Furthermore, as noted by the majority, the *Journal-News* assigned "eight or nine" reporters to investigate Thompson's allegations. Even if the reporters were unable to substantiate her story, this is hardly indicative of a complete departure from the fundamental standards of investigative reporting.

Finally, and most importantly, the majority neglects to mention the one undisputed "subsidiary fact" which has the most relevance to the "ultimate fact" of actual malice, i.e., plaintiff's own statements. The fundamental issue in this case is whether the *Journal-News* knew or should have known that Ms. Thompson was lying when she said that the plaintiff had offered her a job, a trip, and an expensive dinner "in appreciation" for her cooperation and that he had promised to protect her anonymity and that he had threatened to confront Judge Dolan with Thompson's accusations. The factual basis of each one of these allegations was at least partially substantiated by the plaintiff himself. The record shows that the *Journal-News* did not decide to publish Ms. Thompson's allegations until after plaintiff had confirmed that the discussions had taken place. I emphasize that plaintiff has never denied making these statements which appear in the transcript of his pre-publication interview. Even if the eleven subsidiary factual conclusions inferred

by the majority are given the most damaging interpretation, they still cannot support a finding of reckless disregard of the truth in light of the plaintiff's own uncontroverted admissions.

IV.

As a final note, I find it necessary to briefly address plaintiff's contention that he was defamed by the portion of the article which contained Thompson's allegation that plaintiff had used "dirty tricks" to obtain her cooperation as an informant. I discuss this issue separately because I find that the references to "dirty tricks" are constitutionally protected expressions of opinion.

It is well established that "there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (footnote omitted). It is a question of law as to whether an allegedly defamatory statement constitutes an expression of opinion or a statement of fact. *Ollman v. Evans*, 750 F.2d 970, 978 (D.C.Cir.1984) (*en banc*), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985).

The phrase "dirty tricks" appears twice in the article:

Thompson said she believes Dan Connaughton, a candidate for municipal judge, used "dirty tricks" in obtaining her cooperation with his personal investigation of New.

....

Thompson said her reasons for wanting to talk to the *Journal-News* were:

- . 1. To let people know that she did not snitch on New.
- . 2. To reveal the "dirty tricks" Connaughton pulled to get her to make a statement.

She said two other things bothered her about Connaughton's actions: (1) he did not protect her anonymity as promised and (2) he allowed other people to hear tapes of a session with Connaughton and other supporters about what happened with New during Thompson's recent appearance in Hamilton Municipal Court.

I believe that the phrase "dirty tricks" is a conclusory phrase which does not lend itself to precise definition. The accuracy of this statement cannot be verified by any objective criteria. The language of the article which states "Thompson said she believes" clearly indicates that it was Thompson's personal subjective opinion that she had been the victim of "dirty tricks." Moreover, the article also set forth Thompson's allegations which provided the basis for her belief, i.e., that plaintiff had promised her anonymity and that he had broken that promise. The article also presented the plaintiff's position that Ms. Thompson had misinterpreted his comments. Thus, the readers were able to decide for themselves as to whether or not the plaintiff's actions constituted "dirty tricks."

In sum, I find that Ms. Thompson's characterization of the plaintiff's actions as "dirty tricks" is an expression of opinion which is protected speech under the first amendment. Therefore, the *Journal-News* should not be held liable for the publication of that opinion.⁵

For the foregoing reasons, I dissent.

⁵ The majority cites several Second Circuit cases and a Ninth Circuit case for the general proposition that "opinions based on false fact are actionable . . . against a defendant who had knowledge of the falsity or probable falsity of the underlying facts." At 847 (citations omitted). Based on my conclusions in Part I of my dissent, I believe that the inverse of this rule is applicable in the instant case; i.e., if the underlying facts are substantially correct, then the newspaper cannot constitutionally be held liable for expressing an opinion with regard to those facts. *See Orr v. Argus-Press Co.*, 586 F.2d 1108, 1115 (6th Cir. 1978).

APPENDIX B

JOURNAL NEWS

Bribery case witness claims jobs, trip offered

By PAM LONG
Journal-News Writer

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A woman called to testify before the Butler County Grand Jury in the Billy Joe New bribery case claims Dan Connaughton, candidate for Hamilton Municipal Judge, offered her and her sister jobs and a trip to Florida "in appreciation" for their help.

Alice Thompson, 22, 1740 Shuler Ave., was scheduled to testify before the grand jury in relation to the charges against New, who resigned his court position Sept. 22.

Thompson said she believes Dan Connaughton, a candidate for municipal judge, used "dirty tricks" in obtaining her cooperation with his personal investigation of New.

Connaughton, in an interview with the *Journal-News* Monday, confirmed meeting with Thompson.

But he denied any wrongdoing and said Thompson misinterpreted comments and discussions while attending meetings with him and persons involved in his campaign who were gathering information about New and Dolan.

Connaughton filed a complaint with Hamilton police Sept. 27, about New, former director of court services for Hamilton Municipal Court Judge Dolan.

Dolan—who is seeking re-election Nov. 8—fired New Sept. 22.

New, 32, 360 Foster Ave., Hamilton, was arrested Oct. 3 on three counts of bribery. He was bound over to the grand jury by Acting Judge Jack Rosmarin Oct. 14.

New had worked about six years for Dolan, who removed himself from hearing the case in municipal court.

Thompson's statements were made last week in a tape-recorded interview with *Journal-News* representatives. Through a third party, she had contacted the *Journal-News* to ask for a chance to tell her side of the story.

She was interviewed by the newspaper with the understanding that she not discuss her contact with New in Hamilton Municipal Court because that would be covered in her testimony this week before the grand jury.

Thompson said her reason for wanting to talk to the *Journal-News* were:

- 1. To let people know she did not "snitch" on New.
- 2. To reveal the "dirty tricks" Connaughton pulled to get her to make a statement.

She said two other things bothered her about Connaughton's actions: (1) he did not protect her anonymity as promised and (2) he allowed other people to hear tapes of a session with Connaughton and other supporters about what happened with New during Thompson's recent appearance in Hamilton Municipal Court.

Connaughton, some of his supporters and two neighbors were contacted by the *Journal-News* Monday to obtain their recollections of the meetings and conversations.

They claimed there was never any direct offer to Alice Thompson and her sister Patsy Faye Stephens, 32, 1737 Shuler Ave., Hamilton.

Connaughton did admit there was talk about the two sisters working in an ice cream shop the Connaughtons might open.

Thompson and Stephens were subpoenaed among 25 people to appear before the grand jury this week.

In her interview with the *Journal-News* Thompson said there were three meetings and two phone calls initiated by Connaughton, his wife or his brother-in-law Dave Berry.

Thompson, who is represented by lawyer Matt Crehan, a Dolan supporter, is uncertain of the dates the two meetings were held.

She claims that sometime in late August or early September she walked in on a meeting in progress at the home of her parents, Zella and Brownie Breedlove, 1767 Shuler Ave.

Present at the meeting were Zella Breedlove, mother of Patsy Stephens and Alice Thompson; Stephens; Berry; Martha Connaughton (Dan Connaughton's wife); and Joe Cox, head of the Connaughton's campaign, she said.

Berry said he and Martha Connaughton wanted to talk with Stephens and went to the Breedlove house unannounced.

Thompson claims her sister was discussing Patsy's connection with New. Thompson said Martha Connaughton and Berry "knew all about me."

Thompson said she has been in Hamilton Municipal Court twice. In 1980 Dolan found her guilty of assault and ordered her to serve jail time.

In February 1982, Dolan found her guilty of petty theft from K mart on Dixie Highway. Thompson said she was fined, but not given any jail sentence.

Thompson said she became involved because her sister, Stephens, had contacted June Taylor in September 1982,

giving Taylor information on DUI cases in Hamilton Municipal Court.

Taylor passed the name along to Martha Connaughton, Berry said.

Berry and Connaughton's wife claim that first meeting was Sept. 15 and Cox was not there.

Connaughton places the date at Sept. 8, noting his wife told him about the meeting with Stephens and Thompson.

Connaughton said in a letter to the editor published Sept. 20 in the *Journal-News*: "Sept. 17, 1983, I met with this individual. Prior to Sept. 17, 1983, I did not know this person, nor had I known any of the information I was then told."

The second meeting took place either Sept. 16 or Sept. 17 at 12:30 a.m. at Connaughton's home at 138 E. Fairway Drive in Hamilton, according to Connaughton and his supporters.

Thompson, Connaughton and others agree on who attended the meeting.

Those present at the late-night meeting were Thompson, Stephens, Dan Connaughton, Martha Connaughton, Berry, Cox, Ernie and Jeanette Barnes.

Connaughton explained this second meeting was held at 12:30 a.m. "to protect their (the two sisters') anonymity," and because both women were employed at Rinks and worked late.

The *Journal-News* learned that Stephens had been employed at a Rinks warehouse.

Thompson said she has been unemployed for eight months and last worked as a waitress.

The sisters were picked up at Breedlove's home by Berry and Cox, who took them to Connaughton's home.

The Barnes reside across the street from the Connaughtons. The Barnes said they had been asked by Berry and Martha Connaughton to be witnesses "to something very important," Berry had told Jennette Barnes.

Jeanette Barnes, who was not active in the Connaughton campaign at the time of the second meeting, now is active in the campaign.

During the session, Connaughton supporters said two tape recorders ran. Thompson said there were three tape recorders.

Thompson claims the tapes were turned off and on during a session she claims lasted until 5:30 a.m. When the tape was turned off, she said Connaughton made promises about a job and a post-election trip to Florida for Thompson and Stephens which the Connaughton family was going to take.

The Barnes claim the tapes ran continuously.

Dan Connaughton said there were times when the tapes were stopped.

Thompson said that either at that second meeting or a subsequent third meeting Connaughton offered:

- A job for Thompson in appreciation for her help with Connaughton's investigation of Billy New and Judge Dolan.

- a municipal court job for Stephens.

- an invitation for Thompson and her sister to go on a post-election trip to Florida with Connaughton and his family.

- to set up Thompson's parents, Zella and Brownie Breedlove, in the restaurant business at the location of Walt's Chambers, which Connaughton owns and leases. The property is on Court Street opposite the Butler County Courthouse and next to Connaughton's law office.

Connaughton and his supporters claim no promises were made.

Connaughton said he suggested the two sisters may want to go South.

Connaughton said his wife had thought about opening a gourmet ice cream shop at the Walt's Chambers location.

Martha Connaughton said "a job was never promised."

She said the shop was "a dream" she's had for a year, but there are no plans to open a shop. She admitted "after this is all over with I would give them jobs. They deserve a break. That's the social worker in me coming out."

In her interview with the *Journal-News*, Thompson said she would have accepted the trip and the job.

Thompson said she was notified of a third meeting Sept. 21 when Berry called and said he needed to pick up Thompson and her sister.

The morning of Sept. 22 the two sisters were taken to Linda Berry Interiors, 1188 Hamilton-Cleves Road, where Stephens underwent a polygraph test, according to the Connaughton[s] and Thompson.

Linda Berry is Dave Berry's wife.

Connaughton said the test was administered by Carl E. Anderson, a polygraphist from Cincinnati.

Thompson said she was encouraged by Cox, Berry, and Martha Connaughton to take the test. She refused.

Berry claims Thompson was not asked to take the polygraph test.

Connaughton said he waited to file charges until Sept. 27, because he wanted to get the results of the test back. Connaughton had not stayed for the entire polygraph exam.

Berry said Anderson had verbally told Berry that same day that Stephens passed the test.

Connaughton said his wife, Cox, Berry and the two sisters came to his office to pick him up for lunch.

Connaughton learned of New's resignation at his office through Jim Ceory [sic], a lawyer.

Then some of the group went to the Bob Evans Restaurant on Colerain Avenue (U.S. 27), near Northgate, for lunch.

Connaughton said they went to that location in Hamilton County "to try to protect their (Thompson and Stephens) anonymity."

Thompson claimed that Connaughton promised a post-election dinner at the Maisonette in downtown Cincinnati.

Connaughton said "it may have been discussed. I wouldn't say it wasn't discussed."

Thompson claimed Connaughton had told her the tapes he made of her and her sister's statement Sept. 16 or Sept. 17 were to be presented to Dolan.

Thompson said Connaughton hoped to get New and Dolan to resign and then to have himself appointed as municipal judge.

Thompson said that when Dolan did not resign when New was fired, Connaughton became upset and said he was going to file charges. Thompson said she was angry about the prospect of charges being filed and she said she asked for immunity.

Connaughton claims he never told Thompson he was going to file charges.

Connaughton said Butler County Prosecutor John Holcomb assured him immunity would be given. Con-

naughton said he told Thompson she would have immunity.

After the complaint was filed, Thompson said Hamilton police detectives called her in for an investigation. She claims she told the police about the offers Connaughton had made, but officers weren't interested in discussing it.

Connaughton called her later that day Sept. 28 or Sept. 29 after she talked to police detectives. She said Connaughton had heard about the investigation and wanted to know what had happened at the police department.

"Me and him got into it. I told him I was against him and I hung up," Thompson said.

Thompson said Connaughton called her Oct. 3, the day New was arrested by Hamilton police on three counts of bribery. Thompson was one of three people listed in the charges.

Connaughton claims he did not call her the day she talked to police detectives. He claims she called him and was hysterical.

(EDITOR'S NOTE: Other *Journal-News* reporters and editors participating in the interviews and research were Laurel Campbell, Tom Grant, Jeanne Brock, Sue Klearwetter, Jim Blount, Mike Jones, Bill Slabert, Larry Fullerton and Bob Walker.)

[Order of the United States District Court for the
Southern District of Ohio denying Defendant's
Motion for Summary Judgment]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-257

DANIEL E. CONNAUGHTON,
v. *Plaintiff,*

HARTE-HANKS COMMUNICATION, INC.,
Defendant.

[Filed July 17, 1985]

ORDER

This matter is before the Court on defendant's Motion for Summary Judgment. (Doc. No. 14). Upon review of the extensive memoranda and exhibits presented by both sides, the Court concludes that genuine issues as to material facts exist for resolution by the trier of fact. Defendant's Motion is therefore DENIED.

This case involves an article published by the the [sic] Journal-News, a daily newspaper of general circulation owned by defendant Harte-Hanks Communication, Inc. and serving the Hamilton, Ohio metropolitan area. (Doc. No. 22, Stipulated Fact 6). The article appeared on the front page of the November 1, 1983, issue of the paper. It dealt with an aspect of a controversy arising from the election for Hamilton City Municipal Judge between incumbent James Dolan and challenger David Connaughton, the plaintiff herein.

Plaintiff claims that false statements in the article constitute libel. The elements of a libel action in Ohio are that: 1. the statement must be false, 2. the statement must be defamatory towards the plaintiff, 3. the statement must be in writing, 4. the statement must be published, and 5. the defendant must be proven guilty of some degree of fault. *Hersch v. E. W. Scripps Co.*, 3 Ohio App. 3d 367, 374 (1981). The parties have stipulated that plaintiff was a public figure at the time the article was published so the degree of fault required is that of "actual malice." *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 118 (1980).

In ruling on a motion for summary judgment, the narrow question that must be decided is whether there is no genuine issue as to any material fact thereby entitling the moving party to judgment of [sic] as a matter of law. Fed. R. Civ. P. 56(c). The Court cannot try issues of fact on a summary judgment motion but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The evidence together with all inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion. The moving party has the burden of showing conclusively that there exists no genuine issue as to a material fact. *Smith v. Hudson* 600 F.2d 60, 63 (6th Cir.), *cert. denied*, 444 U.S. 986 (1979).

The evidence presented, when viewed in a light most favorable to plaintiff, establishes a genuine issue as to two elements of libel. First, there is conflicting evidence on the issue of whether statements in the article attributed to Alice Thompson are false. The statements were quotes from Ms. Thompson to the effect that plaintiff promised her a job, a vacation, and other things in exchange for information detrimental to plaintiff's opponent in the municipal court race. To support the falsity of the statement, plaintiff has produced the testimony of

three other persons present at the meeting between plaintiff and Ms. Thompson that prompted Ms. Thompson's statements. The three witnesses testified that Ms. Thompson's statements were false. (Affidavits of Jeanette Barnes, Ernest Barnes, and sworn statements of Patsy Stephens at 10-11). Such evidence certainly raises a question as to a material fact.

Second, to refute the charge of actual malice, defendant points to the Journal-News' attempts to verify Ms. Thompson's statements. Plaintiff counters with the sworn statement of Ms. Thompson's sister, a witness to the conversation between plaintiff and Ms. Thompson and arguably the only person present who had a motive to verify Ms. Thompson's statements. The sister states that the Journal-News never tried to contact her prior to publication. (Sworn Statement at 15). Further, plaintiff cites evidence tending to show that the Journal-News favored the incumbent over plaintiff. (Doc. No. 17 at 3-6). Although this evidence may not suffice to meet plaintiff's burden at trial, when accorded all favorable inferences, it does raise an issue of fact as to the Journal-News' interest in objective reporting.

Defendant raises in defense two legal arguments that would preclude liability. The first is an invocation of the neutral reportage doctrine adopted by Ohio Courts in *J. V. Peter v. Knight Ridder*, 10 Med. L. Rptr. 1575 (App. Ct. 1984). That doctrine immunizes from liability the accurate and and disinterested reporting of serious charges made against a public figure by a responsible, prominent organization. *Id.* at 1580. *Edwards v. National Audubon Society*, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). Ms. Thompson does not qualify as such a responsible, prominent organization on a par with the State Attorney General's Office in *J. V. Peter* or the National Audubon Society in *Edwards*. This defense, therefore, must fail.

Finally, defendant asks this Court to rule that Ms. Thompson's statements qualify as opinions and are therefore incapable of libel. One characterization Ms. Thompson made of plaintiff's action in the article was that he was engaged in "dirty tricks." She then went on to mention specific examples such as his offering her a job and a vacation in exchange for information damaging to his political opponent. Such statements can hardly be characterized as opinions. The opinion/fact distinction was first recognized by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1972). There, the Court stated simply:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270.

Id. at 339-40. Unfortunately, *Gertz* provides no guidance for making the opinion/fact distinction. The most recent pronouncement by the Ohio Supreme Court is of no greater assistance. that [sic] Court specifically declined to establish a per se rule for separating opinion from fact. *Milkovich v. News Herald*, 15 Ohio St. 3d 292, 298 (1984). Left with applying a Justice Potter Stewart I-know-it-when-I-see-it standard,¹ the Court rules that Ms. Thompson's statements, when read in the context of the entire article, are stated with sufficient specificity and conviction to constitute facts.

¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., Concurring).

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In sum, the evidence presented to date raises several genuine issues as to material facts thus rendering summary judgment inappropriate.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
Chief Judge
United States District Court

81a

[Judgment of the United States District Court for the Southern District of Ohio denying Defendant's Motion for Summary Judgment]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-84-257

Judge Carl B. Rubin

DANIEL E. CONNAUGHTON

v.

HARTE-HANKS COMMUNICATION, INC.

JUDGMENT IN A CIVIL CASE

- ☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the evidence presented to date raises several genuine issues as to material facts thus rendering summary judgment inappropriate.

KENNETH J. MURPHY, JR.
Clerk

/s/ [Illegible]
Deputy Clerk

DATE July 17, 1985

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[Judgment of the United States District Court for the
Southern District of Ohio]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

C-1-84-0257

Carl B. Rubin, Chief Judge

DANIEL CONNAUGHTON

v.

HARTE-HANKS COMMUNICATIONS, INC.

JUDGMENT IN A CIVIL CASE

- ☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.
- ☐ Decision by Court. This action came to trial on hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff Daniel Connaughton was libeled by the defendant Harte-Hanks Communications, Inc. and that damages by [sic] awarded to the plaintiff as follows:

COMPENSATORY DAMAGES	\$ 5,000
PUNITIVE DAMAGES	\$195,000
ATTORNEY FEES	\$ 0
TOTAL	\$200,000

KENNETH J. MURPHY, JR.
Clerk

/s/ STEPHEN M. SNYDER
Deputy Clerk

DATE 8-28-85

83a

[Order of the United States District Court for the
Southern District of Ohio denying Defendant's
Motion for Judgment Notwithstanding the Verdict]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-257

DANIEL G. CONNAUGHTON,

Plaintiff,

v.

HARTE-HANKS COMMUNICATIONS, INC.,
Defendant.

[Filed Feb. 6, 1986]

ORDER

This matter is before the Court on Defendant's Motion for Judgment Notwithstanding the Verdict (doc. no. 62) and on Defendant's Motion for a Stay of Execution (doc. no. 63). Plaintiff has responded (doc. no. 72) and defendant has replied (doc. no. 73).

The Court has reviewed the proceedings in this matter and has examined the memoranda submitted herewith. Based upon the foregoing the Court is of the opinion that a properly impaneled jury, correctly instructed, awarded a verdict against the Defendant that is supportable from the evidence adduced. Accordingly, the Motion for Judgment Notwithstanding the Verdict is hereby DENIED. Upon such determination the Motion for Stay becomes moot.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
Chief Judge
United States District Court

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[Order of the United States Court of Appeals for the
- Sixth Circuit Staying Mandate]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3170

DANIEL CONNAUGHTON,
vs. *Plaintiff-Appellee,*

HARTE HANKS COMMUNICATIONS, INC.,
Defendant-Appellant

[Filed Apr. 13, 1988]

ORDER STAYING MANDATE

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman

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[Judgment of the United States Court of Appeals
for the Sixth Circuit]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3170

DANIEL CONNAUGHTON,
Plaintiff-Appellee,
v.

HARTE HANKS COMMUNICATIONS, INC.,
Defendant-Appellant.

[Filed Jan. 28, 1988]

Before: KEITH, KRUPANSKY and GUY, Circuit
Judges.

JUDGMENT

ON APPEAL from the United States District Court
for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from
the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this court that the judgment of
the said district court in this case be and the same is
hereby affirmed.

IT IS FURTHER ORDERED that Plaintiff-Appellee
recover from Defendant-Appellant the costs on appeal, as

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itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman

Issued as Mandate:

COSTS:

Filing fee	\$
Printing	\$
Total	\$

A True Copy.

Attest:

Deputy Clerk

87a

[Order of the United States Court of Appeals for the
Sixth Circuit denying a Petition for Rehearing
En Banc and a Petition for Rehearing]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3170

DANIEL CONNAUGHTON,
v. *Plaintiff-Appellee,*

HARTE HANKS COMMUNICATIONS, INC.,
Defendant-Appellant

[Filed Apr. 4, 1988]

Before: KEITH, KRUPANSKY and GUY, Circuit
Judges

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

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[Jury Verdict in the United States District Court
for the Southern District of Ohio]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-84-257

DANIEL E. CONNAUGHTON,
Plaintiff

v.

HARTE-HANKS COMMUNICATIONS, INC.,
Defendant.

[Filed Aug. 16, 1985]

VERDICT

We, the jury, unanimously find that plaintiff Daniel Connoughton was libeled by defendant Harte-Hanks Communications, Inc.

8/16/85
Date

/s/ John Moore
Foreman

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[Special Jury Verdict in the United States District Court
for the Southern District of Ohio]

[IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION]

[C-1-84-257]

[DANIEL E. CONNAUGHTON,
Plaintiff

v.

HARTE-HANKS COMMUNICATIONS, INC.,
Defendant.

Filed Aug. 16, 1985

JURY QUESTIONS

1. Do you unanimously find by a preponderance of the evidence that the publication in question was defamatory toward the plaintiff?

Yes X No

2. Do you unanimously find by a preponderance of the evidence that the publication in question was false?

Yes X No

3. Do you unanimously find by clear and convincing proof that the publication in question was published with actual malice?

Yes X No

If you have answered *all* three questions "yes" please use verdict Form I.

If you have answered *any* question "no" please use verdict Form II.

/s/ John Moore

No. 88-10

Supreme Court, U.S.

FILED

JUL 22 1988

ROBERT E. DANIEL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Is the Sixth Circuit's opinion in this case an appropriate illustration of the manner in which the Supreme Court has instructed appellate courts to review libel judgments in favor of public figures, such as will serve as a model precedent without embellishment by this Court?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-10

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,
v.
DANIEL CONNAUGHTON,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dan Connaughton respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 842 F.2d 825 (6th Cir. 1988).

This is the paradigm case which demonstrates that under the *New York Times*¹ rule a public figure can secure a libel verdict which can emerge unscathed from the independent, *de novo* appellate review mandated by *Bose*,² where the evidence of actual malice is so pervasive as to persuade the Court of Appeals that the jury reasonably found that the plaintiff's proof of actual malice was clear and convincing.

¹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

² *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment, United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Counterstatement Of Facts

On November 1, 1983, the *Journal News*, a division of Harte-Hanks Communications, Inc., published a front page article quoting a woman named Alice Thompson as stating that Daniel Connaughton, a candidate for Municipal Judge, promised her sister and her jobs and trips and other benefits "in appreciation" for their grand jury testimony, that corrupt practices, including bribery, were occurring in the Hamilton Municipal Court, and that Connaughton told her that he intended to play a tape of their statements for incumbent Judge Dolan, his opponent, to force Dolan to resign. The article began by quoting Thompson as charging Connaughton with "dirty tricks" in promising her anonymity and not delivering it.

The statements attributed to Thompson, other statements appearing in the article, and the headline, were false and defamatory in that they were damaging to Connaughton's professional reputation. The article may have caused him to be defeated for judge at the November 8, 1983 election.

The employees of the *Journal News* who designed the article and decided to publish it knew that the article was harmful to Connaughton and was potentially libelous. They also knew that it was probably false, because all of the people asked by the *Journal News* whether Connaughton made the statements in question to Thompson at the meeting when

Thompson told the newspaper they were made, told the *Journal News* that Connaughton made no such statements, and because they also knew that Thompson had been convicted of a crime of deception, had a history of psychiatric illness, and had an admitted motive to fabricate the statements she made to the *Journal News* about Connaughton.

The *Journal News* consciously avoided pursuing clearly available means of making absolutely certain that Thompson's statements were false. Yet, by the time of the prepublication conference when they made the final decision to publish the article, the *Journal News*' decisionmakers had formed the belief that Thompson's damaging accusations against Connaughton were based on Thompson's misinterpretations of what she had heard.

But, notwithstanding entertaining very serious doubts as to the truth of Thompson's statements, the *Journal News* nonetheless published them, because it was smarting from the *Cincinnati Enquirer*'s front page expose of corruption in the Hamilton Municipal Court and was anxious to reestablish the *Journal News* as the dominant news force in Hamilton politics, and also because it wished to revive the sagging campaign of incumbent Judge Dolan, who had been badly wounded by the *Cincinnati Enquirer* and had come to the *Journal News* asking for aid and comfort. The *Journal News*' method of accomplishing these dual objectives was that of using Thompson's statements to turn the focus of Hamilton public opinion from the authentic issue of corruption in Judge Dolan's court to the spurious issue of whether Connaughton had employed unethical means to obtain grand jury testimony against Judge Dolan and his Director of Court Services, Billy New.

Procedural History

The case was tried to a jury before Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, in a bifurcated proceeding. The

liability trial resulted in three separate verdicts for the plaintiff, culminating in the verdict that the *Journal News* published a defamatory, false article about the plaintiff with actual malice.³

Thereafter, the issue of damages was tried to the same jury, which awarded the plaintiff \$5,000.00 in compensatory damages and \$195,000.00 in punitive damages.

Prior to trial, Harte-Hanks moved for Summary Judgment, advancing, *inter alia*, two legal defenses — that the *Journal News* is immune from liability because Thompson's statements were opinions rather than facts, and that the doctrine of neutral reportage gave the newspaper a privilege to publish the article in question. The District Court addressed and disposed of both defenses in denying the motion.

Subsequent to the judgment below, the defendant moved for Judgment n.o.v., and in denying that motion the District Court stated, "the Court is of the opinion that a properly impaneled jury, correctly instructed, awarded a verdict against the defendant that is appropriate from the evidence adduced." (Doc. No. 72)

The Sixth Circuit panel which heard the appeal devoted more than a year to conducting the painstaking, *de novo* review of the record mandated by this Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), "to ensure that the judgment does not pose a forbidden intrusion into First Amendment rights of free expression." *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d at 828 (6th

³ Number one, "Do you unanimously find by a preponderance of the evidence that the publication in question was defamatory toward the plaintiff?" "Yes."

Number two, "Do you unanimously find by a preponderance of evidence that the publication in question was false?" "Yes."

Number three, "Do you unanimously find by a clear and convincing proof that the publication in question was published with actual malice?" "Yes."

Cir. 1988). A panel majority consisting of Judges Krupansky and Keith affirmed the judgment. Judge Guy dissented.

Petitioner then availed itself of its final recourse at the appellate level by filing a Petition For Rehearing And Suggestion For Rehearing En Banc. After receiving Appellee's Response To Petition For Rehearing, the Court of Appeals entered this Order:

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Thus, now it may fairly be said that no fewer than nine federal judges⁴ share the opinion that no reason exists to reverse the judgment in favor of the Respondent, as the verdict rests upon clear and convincing evidence of actual malice.

⁴ The District Judge plus at least eight of the fifteen active judges of the Sixth Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

(1) This Case Was Correctly Decided

In its Petition For Rehearing the Petitioner argued that the Court of Appeals applied an incorrect standard of review, and, mirroring Judge Guy's dissent, that certain statements which Connaughton made to the *Journal News* mandate a reversal of the judgment, and it makes the same argument to this Court.

Respondent demonstrated to the Court of Appeals' satisfaction that neither of those arguments is well taken. Judges Krupansky and Keith assiduously traced and applied the evolving *New York Times* rule to this case, and, moreover, gave the record as exhaustive an independent review as the most stringent reading of *Bose* could command. The Court of Appeals doubtless understood that Petitioner was urging it to substitute Petitioner's view of the evidence for that of the jury in derogation of Connaughton's right to a jury trial guaranteed by the Seventh Amendment. The Sixth Circuit also understood that inasmuch as the Panel Majority correctly assessed the entire record as containing sufficient evidence of actual malice to support a plaintiff's verdict, Connaughton was clearly entitled to have the jury believe his version of the facts instead of the newspaper's, and therefore to prevail on appeal. The fact that Petitioner does not agree with the jury's or the Trial Court's or the Court of Appeals' view of the evidence is beside the point, as this Court has never stated that in order for a public figure to recover against a newspaper the evidence of actual malice has to be uncontroverted.

There is nothing in *Bose* in which the Petitioner can take comfort and much which cuts against its position. Contrary to what Petitioner asserts, *Bose* does not deal the "clearly erroneous" standard of appellate review out of public figure libel litigation, but, rather, as the Court of Appeals recognized in this case, strikes a pragmatic balance between Rule 52(a) and the rule of independent review applied in *New*

York Times, being "faithful to both." *Connaughton, supra*, at 829. A finding may be set aside only where, "the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed," minding the command of Rule 52(a) that "'due regard' shall be given to the trial judge's [or jury's] opportunity to observe the demeanor of the witnesses." *Id.*

Petitioner would have this Court regard *Bose* as authority for the hypothesis that its blatant mischaracterization of Connaughton's speculation as to why Thompson may have misunderstood him, buried under an avalanche of evidence of actual malice, somehow mandates a reversal of the judgment. However, the analytical method the *Bose* Court adopted trenches in the opposite direction. In *Bose* this Court went out of its way to make clear that the testimony upon which the reversal of the plaintiff's judgment hinged would not have rebutted "any evidence of actual malice that the record otherwise supports . . .", *Bose, supra*, at 512, had there been any such evidence. Understanding *Bose* correctly, the Court of Appeals did not misperceive Petitioner's interpretation of Connaughton's answers as rebutting the overflowing evidence of actual malice which both the jury and the Panel Majority found clear and convincing. Thus, the Sixth Circuit clearly understood the teaching of the *Bose* opinion. Judge Krupansky's footnoted observation is particularly instructive:

The dissent, by characterizing as admissions Connaughton's answers to the *Journal* reporter's hypothetical questions during the interview of October 31st, which questions were calculated to elicit purely speculative answers and conjectures, without considering Connaughton's expressed denials to direct questions concerning Thompson's controversial testimony and her purely subjective understandings of Connaughton's statements, or any of the other evidentiary evaluations of the conflicting testimony, clearly demonstrates the wisdom of the Supreme Court's teachings in *Bose*, which were designed to protect a plaintiff's rights to a jury trial in a

defamation case against invasion of the jury's fact-finding prerogatives anchored in credibility assessments of witnesses available only to the actual trier of fact.

Connaughton, supra, at 836.

The record in this case discloses a panoply of diverse evidence of actual malice,⁵ including the admissions of both

⁵ The Court of Appeals stated:

A review of the entire record of the instant case disclosed substantial probative evidence from which a jury could have concluded (1) that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the *Journal* Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolan [Dolan] from the *Journal* as compared with the equally consistently unfavorable news coverage afforded Connaughton; (2) that the *Journal* was engaged in a bitter rivalry with the *Cincinnati Enquirer* for domination of the greater Hamilton circulation market as evidenced by Blount's vituperous public statements and criticism of the *Enquirer*; (3) that the *Enquirer's* initial expose of the questionable operation of the Dolan court was a high profile news attraction of great public interest and notoriety that had "scorped" the *Journal* and by Blount's own admission was the most significant story impacting the Connaughton-Dolan campaign; (4) that by discrediting Connaughton the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area; (5) that Thompson's emotional instability coupled with her obviously vindictive and antagonistic attitudes toward Connaughton as displayed during an interview on October 27, 1983, arranged by Billy New's defense attorney, afforded the *Journal* an ideal vehicle to accomplish its objectives; (6) that the *Journal* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition; (7) that every witness interviewed by *Journal* reporters discredited Thompson's accusations; (8) that the *Journal* intentionally avoided interviewing Stephens between October 27, 1983, the date of its initial meeting with Thompson, and November 1, 1983 when it printed its first story even though it knew that Stephens could either credit or discredit Thompson's statements; (9) that the *Journal* knew that publication of Thompson's allegations charging Connaughton with unethical conduct and criminal extortion and her other equally damaging statements would completely discredit and irreparably damage Connaughton personally, professionally and politically; (10) that its prepublication legal review was a

the News Director and the author of the article that they made no determination as to whether Thompson's defamatory statements about Connaughton were true,⁶ and of the newspaper's lawyer that at the prepublication conference the News Director, Managing Editor and Publisher told him that Thompson's statements were based upon her misinterpretations of what Connaughton said.⁷

Petitioner unfairly accuses the Court of Appeals of equating, "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers", *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion of Justice Harland), with actual malice.

A careful reading of the *Connaughton* opinion reveals Petitioner's argument in this regard to be disingenuous. Indeed, the Panel Majority made it abundantly clear that it viewed "journalistic malpractice" as merely among "the type of substantive evidence that offers assistance to a reviewing court in exercising its independent judgment to determine if the evidence bearing upon the constitutional issue of actual

sham; (11) that the *Journal* timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*. 842 F.2d at 843-4.

⁶ News Director Blount admitted that when the *Journal News* published the article, "there is no judgment on our part as to who was telling the truth" (Tr. 638, 9).

⁷ "I was told as we went over this line by line that Dan Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips." (Tr. 819)

Petitioner goes out of its way to refer to that as a "strained" interpretation of Irwin's testimony. (Petition, p. 8, footnote 6). But the transcript demonstrates that such is not the case. Irwin, an experienced lawyer, was asked at trial whether he made that precise statement during his deposition and he acknowledged that he did. *Id.*

malice is sufficiently clear and convincing to support the verdict." *Connaughton, supra*, at 845. The Court pointed out that *Herbert v. Lando*, 441 U.S. 153 (1979), "teaches that the presence or absence of motive and/or other circumstances as heretofore discussed for publication of the article may reflect upon the publisher's intent and purpose to publicly disseminate the article in controversy," *Connaughton, supra*, at 845, and recognized that, "It is well established that evidence that a publisher failed to investigate does not, by itself, prove actual malice." *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (emphasis added) (citing *St. Amant*, 390 U.S. at 732-33, 88 S.Ct. at 1326)." *Id.* at 846.

It is clear that Judge Krupansky read the record as demonstrating that the conduct of the *Journal News* disclosed a state of mind far worse than that which is inferrable from even an extreme departure from adversary standards of investigation:

Although the *Journal* attempted to characterize its failure to contact Stephens as an act of negligence that was insufficient to establish actual malice, its failure to interview her must be considered in conjunction with other direct and circumstantial evidence bearing on the issue of "actual malice."

Connaughton, supra, at 846.

(2) There Is No Conflict Between Circuits Or Confusion In Caselaw Which Requires Clarification

Contrary to Petitioner's contention, the D.C. Circuit's decision in the *Tavoulareas*⁸ case is not legally inconsistent with the Sixth Circuit's decision in this case. That the former court upheld the district court's Judgment n.o.v. in favor of the defendants, whereas the Sixth Circuit affirmed a jury verdict in favor of the plaintiff, does not establish legal tension between the two circuits, inasmuch as both appellate courts faithfully followed the procedure this Court established in *New York Times* and *Bose* for reviewing judgments in public figure libel cases. As the D.C. Circuit stated in *Tavoulareas*, "... by virtue of the First Amendment nature of this litigation, the jury verdict must be measured, on the basis of an independent examination, against the heavy burden of proof imposed on a plaintiff who is a public figure:

In reviewing a defamation verdict, courts must exercise particularly careful review. They "must 'make an independent examination of the whole record,' . . . so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963))."

817 F.2d at 776.

The Sixth Circuit's opinion in this case reproduced the above-recited quotation from *New York Times* and added, "Guidance in harmonizing the rules confronting the court in its search for a resolution is afforded by the pronouncements of *Bose Corp.*:"

Our standard of review must be faithful to both Rule 52(a) and the rule of independent review applied in *New*

⁸ *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987).

York Times Co. v. Sullivan. The conflict between the two rules is in some respects more apparent than real. The *New York Times* rule emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. [364], 395, 68 S.Ct. [525], 542, 92 L.Ed. 746 (1948). Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due.

Bose Corp., 466 U.S. at 499-500, 104 S.Ct. at 1959 (emphasis added)."

Even though the Sixth Circuit Panel Majority is critical of the *Tavoulareas* en banc majority, a fair reading of the *Tavoulareas* opinion does not reveal any statements which are irreconcilable with the principles of public figure libel law articulated in the Sixth Circuit's *Connaughton* opinion. The *Tavoulareas* en banc majority, after conducting a *de novo* review of the record, concluded that the plaintiff's evidence did not even support the jury's finding that the article was false. The *Connaughton* Panel Majority, after conducting the same thorough review, concluded that the plaintiff's evidence amply supported his verdict in every respect. *Connaughton*'s evidence on every element which a public figure must prove in order to prevail was manifestly more powerful, both quantitatively and qualitatively, than was *Tavoulareas*' evidence. The D.C. Circuit would probably have affirmed *Connaughton*'s verdict as easily as the Sixth Circuit did. That

speculation is beside the point, however, as one cannot find in the opinions of these two distinguished appellate courts in the *Connaughton* and *Tavoulareas* cases the requisite degree of potential conflict to make a grant of certiorari appropriate.

Moreover, even if not an exact mirror image of *Tavoulareas*, *Connaughton* evinces an accurate understanding of the *Bose* teaching and its outcome reflects the proper application thereof.

Petitioner also argues that there is a conflict between dictum appearing in the opinion of the California Supreme Court in *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987), and the analysis this Court adopted from the Ninth Circuit's opinions in *Guam Fed'n of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974), and *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975), that an appellate judge on review must examine the evidence to see whether, if all possible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice.

Whether such a conflict exists, the clarity and correctness of the Sixth Circuit's legal analysis, reflecting, as it does, a logical and reasoned interpretation of the Supreme Court's directives in *Bose* and other cases, makes it unnecessary for this Court to speak to the subject again. As Judge Krupansky wrote for the Court:

In turning to the consideration of actual malice in the instant case, this court must, from an examination of the record, first determine if the jury's resolution of the subsidiary or operative facts was clearly erroneous; that is, if, after reviewing the entire evidence, the reviewing

court was left with the definite firm conviction that a mistake had been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Connaughton, supra, at 843.

Petitioner does not demonstrate that the foregoing is not the proper application of controlling law.

(3) Reversal Of The Judgment Would Be Calamitous

Petitioner and its legion of amici representing the organized media would have the Court believe that only if the judgment in this case is reversed can the First Amendment recover from the staggering blow it has been dealt by the Court of Appeals for the Sixth Circuit. We doubt that the journalistic community has ever seen a record that could support a libel verdict won by a public figure.

In truth, if the *New York Times* rule is to retain vitality, a plaintiff who makes as overpowering a showing of harm, falsity and actual malice as Dan Connaughton made in this case *must* prevail on appeal.

If this Court were to grant certiorari and reverse the judgment, it would accomplish three undesirable ends: (a) deprive Respondent of the benefit of the jury's findings in violation of the Seventh Amendment; (b) sound the death-knell for public figure libel claims and reduce the right to gain redress for the big political lie to a mirage, practically unattainable; and (c) plunge appellate review of public figure libel judgments into the "thorny thicket" of uncharted confusion, leaving each judge free to arrive at his own view of the evidence, not having listened to the testimony or observed the demeanor of a single witness.

The balanced application of *Bose* which the Sixth Circuit so thoughtfully crafted in this case well serves the imperatives of the First *and* Seventh Amendments as well as the authentic

rights of the injured plaintiff. This lawsuit is exemplary of a well-decided public figure libel case. The Sixth Circuit's opinion will serve as a model precedent without embellishment by this Court.

CONCLUSION

For all these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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JUL 29 1988

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

HARTE HANKS COMMUNICATIONS, INC.,
v. *Petitioner,*
DANIEL CONNAUGHTON,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF
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CBS INC., THE CINCINNATI ENQUIRER,
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THE MIAMI HERALD, NATIONAL ASSOCIATION
OF BROADCASTERS, NATIONAL BROADCASTING
COMPANY, INC., NATIONAL NEWSPAPER
ASSOCIATION, NEWSLETTER ASSOCIATION,
THE NEW YORK TIMES COMPANY,
THE PHILADELPHIA INQUIRER, RADIO-TELEVISION
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-10

HARTE HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,
ASSOCIATED PRESS, CAPITAL CITIES/ABC, INC.,
CBS INC., THE CINCINNATI ENQUIRER,
CHRONICLE PUBLISHING COMPANY, DOW JONES
& COMPANY INC., GLOBE NEWSPAPER COMPANY,
THE MIAMI HERALD, NATIONAL ASSOCIATION
OF BROADCASTERS, NATIONAL BROADCASTING
COMPANY, INC., NATIONAL NEWSPAPER
ASSOCIATION, NEWSLETTER ASSOCIATION,
THE NEW YORK TIMES COMPANY,
THE PHILADELPHIA INQUIRER, RADIO-TELEVISION
NEWS DIRECTORS ASSOCIATION, REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS,
SOCIETY OF PROFESSIONAL JOURNALISTS
SIGMA DELTA CHI, TIME INC., THE TIMES MIRROR
COMPANY, AND TRIBUNE COMPANY
IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of twenty-one *amici curiae* who include broadcasters, publishers of newspapers and magazines, and associations of working journalists. Together, they comprise a broad cross-section of the news media in this country.* The *amici* are more fully described in the Appendix to this brief.

These *amici* have a profound interest in this matter because they or their members frequently publish or broadcast news articles and editorials about election campaigns and often publicly endorse political candidates. This Court has consistently held such activities to be at the core of speech protected by the First Amendment. The ruling of the court below punishes such speech and if not reversed will have a broad negative impact on speakers beyond the litigants in this case.

Because the *amici* operate under a constant threat of libel claims, they rely on appellate courts to review independently jury determinations of actual malice. Independent review is fundamental to First Amendment protection, and the appellate court below totally disregarded and misconstrued its meaning. The *amici*, therefore, request that this Court grant the petition to correct the Sixth Circuit's encroachment on fundamental First Amendment protections.

SUMMARY OF ARGUMENT

The decision of the court below poses a two-pronged threat to free and open debate, either of which alone merits the attention of this Court to preserve "the majestic protection of the First Amendment." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). First, the court below eviscerated the protection of independent review provided by *Bose*. Second,

* Written consent of both parties has been filed with the Clerk of Court pursuant to Rule 36 of the Court.

the court undermined the fundamental right of public debate in the political arena, by allowing an inference of actual malice to be drawn from the petitioner newspaper's endorsement of a political opponent of the respondent.

This Court in *Bose* has required appellate courts to review independently the entire record whenever a jury concludes that a libel defendant acted with actual malice. The court below abdicated that duty by speculating as to what inferences would be consistent with the jury's verdict of liability and then portraying itself as bound by Fed. R. Civ. P. 52(a) to agree with those inferences unless clearly erroneous. This application of *Bose* both conflicts with decisions of other courts and, if adopted elsewhere in the future, would effectively eliminate independent review.

The Court below also held that a newspaper's endorsement of a political candidate opposing the respondent and its normal competition with another newspaper that endorsed the respondent constitute evidence of actual malice. This departure from the principle of viewpoint neutrality and complete misunderstanding of the meaning of actual malice cannot be allowed to stand without seriously chilling editorial speech and sending a message to editorial writers that they should avoid commentary on issues that are the subjects of news stories.

At the heart of this controversy is a newspaper's coverage of a political campaign. This Court has repeatedly intervened to protect the vigorous political speech that is fundamental to democratic self-governance. It should do so again in this case.

ARGUMENT

I. The Sixth Circuit Abdicated Its Constitutional Duty To Review Independently The Jury's Determination Of Actual Malice.

A. *New York Times* and *Bose* Require Appellate Courts to Review *De Novo* All Record Evidence Relating to a Jury's Finding of Actual Malice.

This Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964), and reaffirmed in *Bose*, 466 U.S. at 498-511, that appellate courts are required by the First Amendment to conduct an independent, *de novo* review of the entire record when a fact finder determines that a libel defendant has acted with actual malice.¹ This "independent" review is expressly distinguished from the traditional Rule 52(a) "clearly erroneous" review that grants deference to a jury's findings and inferences. *Bose*, 466 U.S. at 501, 514.

New York Times defined the scope of such independent review to include all record evidence relating to the jury's finding of actual malice:

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied [T]he rule is that we "examine for ourselves the statements in issue and circumstances under which they were made". . . . We must "make an independent review of the whole record". . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times, 376 U.S. at 285 (citations omitted).

Bose reiterated the *New York Times* standard, 466 U.S. at 508, and emphasized that independent review

¹ See also *Time Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 82 (1967).

means "*de novo* review." *Id.* at n.27. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" *Id.* at 511. Thus, *Bose* requires *independent review* of the *record evidence*, while Rule 52(a) requires *deferential review* of the *jury's findings and inferences*.

The Court elaborated three reasons for this special standard of review:

First, the common-law heritage of the [actual malice] rule assigns an especially broad role to the judge in applying it to specific factual situations. Second, the content of the rule is not revealed simply by its literal text Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.

Id. at 502.

The wide disparity between jury and appellate determinations of liability provides empirical support for this Court's concerns. Juries have been overwhelmingly more favorable to defamation plaintiffs than have appellate judges. Public official plaintiffs prevailed in approximately 76% of libel actions against media defendants that went to the jury in the period between 1976 and 1986. *Libel Def. Resource Center Bull. No. 21*, at 2, 5 (Oct. 31, 1987); *Libel Def. Resource Center Bull. No. 16*, at 2 (Mar. 15, 1986). Two-thirds of those verdicts were subsequently reversed on appeal. *Libel Def. Resource Center Bull. No. 16*, at 2 (Mar. 15, 1986). See also *Libel Def. Resource Bull. No. 7*, at 1, 21 (July 15, 1983) (a 1983 study revealed that 51 out of 60 appeals by libel defendants on constitutional issues resulted in reversal or modification of the verdict).

This discrepancy between appellate and jury deliberations is one compelling reason the *amici* are before this

Court to urge that the First Amendment protection of independent review not be lost. Juries cannot be expected to apply consistently the constitutional protections shielding defamation defendants. Larger concerns about self-censorship and overbroad restrictions on speech cannot be adequately addressed by a jury focusing on a single case. Courts, therefore, have the constitutional task of providing an independent review of the record in light of overriding First Amendment concerns.

Three federal courts of appeals, soon after *Bose*, acknowledged their duty to review independently the entire record and in each instance examined specific subsidiary factual issues in concluding that there was not clear and convincing evidence of actual malice. *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); *Mr. Chow v. Ste. Jour Azur, S.A.*, 759 F.2d 219, 230 (2d Cir. 1985); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088-90 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Brasslett v. Cota*, 761 F.2d 827, 839-40 (1st Cir. 1985).²

The court below, however, has joined three other federal courts of appeals in departing from this understanding of *Bose*. Those courts have either enunciated an overly deferential standard of review for jury findings and inferences or have questioned whether *Bose* imposes a different standard of review than the traditional Rule 52(a) "clearly erroneous" standard.³ Those decisions

² See also *Tavoulareas v. Piro*, 817 F.2d 762, 777 (D.C. Cir.) (*en banc*), *cert. denied*, 108 S. Ct. 200 (1987). That court declined to resolve what it determined to be the "somewhat murky dispute" over whether *Bose* requires independent review of underlying facts and inferences or in fact "does not alter the traditional rules governing the review of jury verdicts." The court below nevertheless condemned the *en banc* majority in *Tavoulareas* for invading the traditional function of the jury. App. at 33a n.11.

³ The Fifth Circuit, while acknowledging *Bose*, nonetheless stated that "the factfinder retains its traditional role in the determination of the facts . . ." *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d

have not only created a split in the federal courts of appeals over the meaning of independent review, but have also undermined the First Amendment protections of *New York Times* and *Bose*. Certiorari is necessary to reaffirm that *New York Times* and *Bose* require *de novo* review of *all* record evidence relating to a finding of actual malice.

B. The Sixth Circuit Gave Deference to Nonexistent Jury Findings and Ignored Critical Evidence That Compels Reversal of the Jury Verdict.

The Sixth Circuit's departure from *Bose* in this case is the most complete rejection of independent review by a federal court of appeals to date. As the dissent pointed

1066, 1071 (5th Cir. 1987). In *Tavoulareas v. Piro*, 759 F.2d 90, 107-08, *vacated*, 763 F.2d 1472 (D.C. Cir. 1985), the panel decision held that *Bose* requires independent review only of the "ultimate fact" of actual malice but not of the preliminary factual findings upon which the ultimate finding of actual malice is based. The Seventh Circuit now appears convinced that *Bose* does not clarify whether independent review extends to facts, evaluations of credibility and the drawing of inferences. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

This split of authority extends to the state courts as well. Compare *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987) (expressly requiring independent review of all record evidence); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846 (1985) (recognizing that *Bose* requires independent review of all record evidence) with *Sible v. Lee Enter., Inc.*, 729 P.2d 1271, 1272 (Mont. 1986), *cert. denied*, 107 S. Ct. 3242 (1987) (the Montana Supreme Court simply ignored *Bose* and viewed the record in the light most favorable to the plaintiff, the losing party at trial); *Wanless v. Rothballer*, 115 Ill. 2d 158, 503 N.E.2d 316, 321 (1986), *cert. denied*, 107 S. Ct. 3213 (1987) (although the Illinois Supreme Court purported to follow *Bose*, it stated that it should not reexamine discrete facts or make independent findings with regard to supporting evidence of actual malice); *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1170 (1983) (failing to recognize the independent review required by *New York Times*, the Vermont Supreme Court reviewed the evidence of malice in the light most favorable to the plaintiff).

out, the factual testimony at trial was largely undisputed. *Id.* at 62a. Thus, it cannot be that the determination of actual malice in this case was simply a matter of witness credibility. Rather, it turned on which facts the jury credited as evidence of actual malice and the inferences it drew from those facts. Those assessments are precisely what *Bose* requires appellate courts to review independently, which the court below refused to do.

Instead, the court below granted deference to findings and inferences it imputed to the jury—on issues other than credibility of the witnesses—that are nowhere found in the record. The jury was simply presented with three special interrogatories, asking whether the statements were (1) defamatory, (2) false, and (3) published with actual malice. *Id.* at 89a. The sum total of the jury's "findings" was an affirmative answer to each of these three conclusory questions. *Id.* From this, the court of appeals somehow divined an elaborate set of findings and inferences the jury "could have" made concerning (1) the petitioner's endorsement of the respondent's political rival, (2) the petitioner's competition with another newspaper in the marketplace and (3) the petitioner's alleged failure to investigate and bad motive in publishing the article. *Id.* at 35a-36a.⁴

The court below then deferred to these manufactured "jury findings," concluding that they were not clearly erroneous, and held that they constituted clear and convincing evidence that petitioner acted with actual malice. *Id.* at 36a-37a. As the dissent points out, *id.* at 49a, by creating and then deferring to these supposed "findings," the court below ignored the two most telling aspects of

⁴ The constitutional irrelevance of these "findings" to a determination of actual malice is set out in Part II, *infra*. Moreover, respondent's admissions in a prepublication interview with petitioner eradicate any claim that petitioner failed to investigate prior to publication. See Notes 5-7 and accompanying text, *infra*.

the record: the actual language of the allegedly defamatory article,⁵ and respondent's confirmation of the article in a tape-recorded, prepublication interview with petitioner.⁶

It is difficult in a short space to improve on the dissent's systematic analysis of the challenged statements in light of respondent's admissions. See *id.* at 49a-58a. As that analysis reveals, respondent specifically admitted each statement subsequently challenged in the article. Those admissions alone require reversal both of the finding that the article was not substantially true and of the finding that petitioner acted with reckless disregard of the truth of the statements.⁷

The error of the court below is shown as well by the contrast between statements of this Court in *Bose* and those of the court below. *Bose* states:

We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*. Appellate judges in such a case must exercise inde-

⁵ Rather than address the challenged statement, the court below focused on an article that appeared two days prior to the alleged defamatory article. App. at 14a-16a. In fact, the court chose to attach as an appendix to its opinion this prior article rather than the disputed article and not once quoted the challenged language. *Id.* at 45a-49a.

⁶ The dissent aptly observed: "It is precisely because Connaughton's statements 'are a matter of record' that this court is obliged to consider them in determining whether the judgment against [petitioner] is contrary to the first amendment." App. at 59a.

⁷ As the dissent pointed out, reversal in the face of these admissions was demanded even under a deferential Rule 52(a) review. App. at 50a. *A fortiori*, the court should have reversed under the independent review prescribed by *Bose*.

pendent judgment and determine whether the *record* establishes actual malice with convincing clarity.

466 U.S. at 514 (emphasis added). Amazingly, the court below responded:

Mindful of the dictates of *Bose Corp.*, this court's attention is, in the first instance, directed to an examination of the entire record of subsidiary, operative or preliminary facts (hereinafter referred to as the operative facts), however characterized, to determine if the *jury's findings* were *clearly erroneous*.

App. at 4a (emphasis added).

On the issue of the fact finder's opportunity to observe the demeanor of the witness at trial, this Court in *Bose* stated that appellate courts are "permitted" to give "due regard" to the fact finder's determination of witness credibility and accepted the conclusion that one of the defendant's chief witnesses was not credible. 466 U.S. at 499-500. But the Court went on to hold that a fact finder's refusal to believe a witness does not necessarily establish actual malice. Instead, in *Bose*, the Court reviewed for itself the inference the district court had drawn from its creditability finding. Because there was no other evidence supporting that inference—that the author had known of his incorrect use of language at the time of publication—the Court determined that actual malice had not been proven by clear and convincing evidence. *Id.* at 512.

The court below, however, effectively avoided any appellate review by holding that jury members are the "ultimate factfinders" on the issue of witness credibility and by characterizing this as a case whose "core issue was simply one of credibility to be attached to the witnesses In sum, the jury simply did not believe the defendants' [sic] witnesses, its evidentiary presentations or its arguments." *App.* at 27a-28a. Such a total

disregard of the Court's requirement of independent review should not escape scrutiny by this Court.

II. Actual Malice Cannot Be Predicated Constitutionally On A Political Endorsement, Competition Between Members Of The Media Or Common Law Malice.

A. Basing Actual Malice on a Newspaper's Endorsement of a Political Candidate Violates the First Amendment.

The Sixth Circuit in part based its affirmance of the jury's finding of actual malice on the petitioner's endorsement of an incumbent judge, the respondent's political rival.⁸ But a news medium's editorial position cannot be allowed to constitute admissible evidence of actual malice for at least three reasons. First, allowing an editorial to constitute evidence of actual malice violates the First Amendment principle of viewpoint neutrality. Second, it circumvents the requirement that defamation liability be based only on state of mind with respect to truth or falsity: here the jury was permitted to draw an inference of *common law malice* from the content of *other* speech published by petitioner—speech fully protected by virtue of its being opinion—and then draw an inference of *actual malice* from the presumed common law malice. Third, allowing such editorial speech to serve as evidence of actual malice would severely chill important political speech.

⁸ The majority observed that the defendant had endorsed the rival candidate six years earlier when he first ran for office, and again endorsed him the day before the election (five days *after* publication of the article of which plaintiff complains). The court below then assigned to the jury the finding that petitioner was motivated to publish the November 1 article "by a desire to promote Dolan as its candidate . . . by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons." *App.* at 27a. *See also id.* at 35a (jury "could have concluded" that petitioner was "singularly biased" in favor of rival due to "unqualified, consistently favorable editorial and daily news coverage received by Dolon [sic]"), 5a, 21a, 42a-43a.

Since *New York Times* this Court has developed the contours of libel law by balancing the "legitimate state interests" in compensating individuals for injury to reputation against fundamental First Amendment protections to provide "adequate breathing space" for speech and to prevent self-censorship. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-50 (1974); *New York Times*, 376 U.S. at 271-72. This balancing process has produced, for the sake of certainty and predictability, a number of rules. *Gertz*, 418 U.S. at 343-44. For example, the state interest is always defeated whenever a public figure is unable to prove actual malice by clear and convincing evidence. *E.g.*, *id.* at 342-43. Likewise, the state has no legitimate interest in imposing liability without proof of fault, *id.* at 347, or without actual injury, *id.* at 349, in light of the countervailing First Amendment interests.

The court below, by inferring actual malice from petitioner's endorsement of respondent's political rival, violates another fundamental rule: states have no legitimate interest in imposing liability on libel defendants for endorsing particular political candidates in light of the First Amendment interest in protecting political speech.⁹ This Court has repeatedly held that political speech is at "the core of the First Amendment." *E.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *See also FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984) (editorializing on matters of public importance "is entitled to the most exacting degree of First Amendment protection"). This core area of protection "is to be afforded for 'vigorous advocacy' no less than 'abstract dis-

⁹ Moreover, the endorsement of a political candidate falls squarely within the scope of constitutionally protected opinion. *Gertz*, 418 U.S. at 339-40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). *See also Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988) (even outrageous statements of opinion in the form of parody are privileged).

cussion,' " *New York Times*, 376 U.S. at 269 (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)), and "includes discussions of [political] candidates," *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Content-based restrictions on political speech violate the First Amendment principle of viewpoint neutrality. *E.g.*, *Boos v. Barry*, 108 S. Ct. 1157 (1988). *See also City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611 (U.S. June 17, 1988) (a state cannot employ content—or viewpoint-specific criteria in restricting speech). *Boos* recently affirmed that the state interest in protecting public figures is not sufficiently compelling to justify content-specific penalties for even "insulting" and "outrageous" political speech. 108 S.Ct. at 1164 (citing *New York Times* and *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988)). Moreover, *Bose* itself emphasized that preservation of the "principle of viewpoint neutrality that underlies the First Amendment" is one of the primary goals of independent review by appellate courts. 466 U.S. at 505. The court below violated that principle not only by refusing to review independently the jury verdict,¹⁰ but also by upholding the jury's finding of actual malice on a content-specific basis: the petitioner's endorsement of a particular political candidate. To recognize such a recovery penalizes individuals for publicly endorsing political candidates or ideologies

¹⁰ An additional example is the court's failure to review independently the constitutionality of a punitive damages award of \$195,000 that was totally out of proportion to the minimal \$5,000 compensatory award. Such a disparity must be attributed to the jury's desire to punish the petitioner for taking an unpopular stand because there was no competent evidence of actual malice. This award underscores another disturbing trend in libel actions against media defendants. Disproportionately large punitive awards are beginning to dominate these cases. Nearly 60% of libel damage awards during the period between 1980 and 1984 included an award for punitive damages. *Libel Def. Resource Center Bull. No. 11*, at 14-15 (Nov. 15, 1984). Moreover, punitive damages during that period amounted to 80% of the total damages awarded. *Id.*

while speaking openly and vigorously about rival political figures.

Allowing the endorsement to give rise to an inference of actual malice also circumvents the actual malice requirement of *New York Times*. The actual malice rule at a minimum requires the factfinder to look behind the allegedly defamatory words to the defendant's state of mind as to truth or falsity; nor is it enough that the defendant harbored ill will toward the plaintiff. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 881 (1988). Instead, the Sixth Circuit focused on other words published by the defendant, not even at issue in the case, and drew an inference of ill will from their content, which ill will in turn served as evidence of actual malice. A fact finder should not base a finding of actual malice on an inference of common law malice presumed from the content of the allegedly defamatory speech actually at issue in the case. But it is even worse for such an inference to be based on other editorial speech not even alleged to be defamatory.

Admission of evidence of a defendant's editorial position poses too great a threat to the free flow of political speech. It is the nature of editorials that they address the most controversial and topical issues of the day, issues that more often than not are contemporaneously dealt with in news stories. If news media must worry that their editorial commentaries and positions will become evidence of bias when the subjects claim news stories are defamatory, editorials will become cautiously worded and equivocal. Allowing the fact finder to consider a news medium's editorial position as evidence of actual malice "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' (citation omitted), which must be protected if the guarantees of the First and Fourteenth Amendments are to

prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276-77 (1971).

B. Competition Between Members of the Media Is Constitutionally Irrelevant to a Determination of Actual Malice.

The assessment of the court below that a newspaper's normal competition in the marketplace constitutes evidence of actual malice is a pernicious intrusion on core First Amendment protection. Because the media are necessarily motivated in part by commercial realities and competition, the court's ruling essentially creates a presumption of actual malice in virtually every libel action that names a media defendant, thereby eliminating the requirement imposed by *New York Times* that actual malice be proved by clear and convincing evidence.

A determination of actual malice turns on whether a statement was published with serious doubts about its truth. *E.g., St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Whether a story is published under competitive pressure to produce hard-hitting investigative articles is simply irrelevant to that determination. *Tavoulareas*, 817 F.2d at 796-97 & n.50. The presence or absence of competition adds nothing to the basic inquiry. "[T]he First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by . . . public figures." *Id.* at 796. Indeed, the existence of competition serves the First Amendment goal of securing "the widest possible dissemination of information from diverse and antagonistic sources." *New York Times*, 376 U.S. at 266 (citation omitted).

The fact that political speech may have commercial value in terms of newspaper sales in no way diminishes its political nature or reduces the protection afforded by the First Amendment. In rejecting the notion that a political advertisement in a newspaper was less protected than other political speech, this Court stated in *New York Times*:

That the Times was paid for publishing the advertisement is *as immaterial in this connection as is the fact that newspapers and books are sold.*

376 U.S. at 266 (emphasis added).¹¹

C. Common Law Malice Is Constitutionally Insufficient to Establish Actual Malice.

The Court need look no further than its decisions in *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); and *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), to perceive the vacuity of the remaining "evidence" of actual malice relied on by the court below.¹² A publisher's lack of personal knowledge, failure to heed the consequences of publication, failure to consider whether a statement may defame and failure to investigate a statement's accuracy are all constitutionally insufficient to establish actual malice by clear and convincing evidence. *St. Amant*, 390 U.S. at 730-33. Likewise, common law

¹¹ This was reaffirmed in the context of obscenity cases when this Court held that granting *any* weight to the fact that a publication is sold for profit would "offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S. 463, 474 (1966). See also *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (quoting passage from *Ginzburg*); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) (an economic motivation for mailing pamphlets does not, by itself, reduce the publication to less-protected commercial speech).

¹² The "evidence" relied on by the court, see App. at 35a-36a, consisted of manufactured jury findings. See Note 4 and accompanying text, *supra*. Moreover, many of those purported "findings" focused on common law malice, not constitutional malice. For example, the court credited as evidence of actual malice that petitioner (1) was supposedly biased against respondent, (2) was attempting to discredit respondent and (3) sought to maximize the impact of the article.

malice, variously described as hatred, spite, ill-will, hostility or a deliberate intention to harm, is a constitutionally impermissible basis for establishing actual malice. *Old Dominion*, 418 U.S. at 281-82; *Greenbelt Coop.*, 398 U.S. at 9-11. See also *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. at 881 (the First Amendment prohibits finding actual malice on the basis of "bad motive"); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974) (distinguishing actual malice from common law malice).

Although "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," *St. Amant*, 390 U.S. at 732, verification of the informant's statements in this case came from respondent himself, in his prepublication admissions to petitioner.¹³ Nothing in the record supports a finding of actual malice by clear and convincing evidence.

III. Summary Reversal Is Warranted In This Case.

The Sixth Circuit Court of Appeals so clearly departed from its constitutional duty independently to "determine whether the record establishes actual malice with convincing clarity," *Bose*, 466 U.S. at 514, that summary reversal is warranted under Supreme Court Rule 23.1. That failure was compounded by the court's affirmance of the jury's finding of actual malice on constitutionally impermissible and irrelevant grounds, while ignoring prepublication admissions by the respondent that establish the substantial truth of the challenged statements and preclude a finding of actual malice. Summary reversal is especially appropriate in this case because "judges—and particularly *Members of this Court*—must exercise

¹³ See Judge Guy's dissent for a summary of respondent's admissions. App. at 59a-58a.

[independent] review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11 (emphasis added).

CONCLUSION

For the reasons stated, the *amici* respectfully request that this Court grant the petition for certiorari, independently review the record and summarily reverse the decision of the Sixth Circuit for its failure to exercise independent review and for crediting as proof of actual malice constitutionally impermissible and irrelevant evidence.

July 29, 1988

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The American Society of Newspaper Editors is a nationwide professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include the ongoing responsibility to improve the manner in which the journalism profession carries out its obligations to provide an unfettered and effective press in the service of the American people.

The Associated Press ("AP"), the world's largest news gathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York. AP engages in gathering and distribution of news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

Capital Cities/ABC, Inc., through subsidiaries, owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers, magazines, and books.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks. The CBS Publishing Group publishes numerous nationally distributed magazines and hard-cover books.

The Cincinnati Enquirer is a daily newspaper published in Cincinnati, Ohio as a division of Gannett Satellite Information Network, Inc., with daily circulation of 194,804 and Sunday circulation of 328,378.

The Chronicle Publishing Company publishes the *San Francisco Chronicle* with a daily circulation of 565,000

and a Sunday circulation of 730,000. The Chronicle Broadcasting Company, a division of Chronicle Publishing Company, also operates three television stations.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, The Dow Jones News Service, and a number of other publications. Through its Ottaway Newspapers, Inc. subsidiary, it publishes newspapers in 23 communities in 13 states across the nation.

Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston which has the largest circulation in New England, with a daily circulation of approximately 500,000 and a Sunday circulation of approximately 800,000.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcasting networks. NAB's members cover, produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

Miami Herald Publishing Company is an unincorporated division of Knight-Ridder, Inc., which publishes the *Miami Herald*, a newspaper of daily circulation throughout south Florida.

National Broadcasting Company, Inc. owns and operates a national television network, and through subsidiaries operates television stations, all of which are engaged in the gathering and dissemination of news to the public.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in

1885 and with more than 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For over a century, a prime concern of NNA has been to ensure that political debate in this country be conducted in an open and robust manner.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. NA has a long-standing commitment to the free exchange of information and opinion through the written word as protected by the First Amendment; therefore it has an interest in the outcome of this particular case.

The New York Times Company publishes thirty five newspapers, including *The New York Times*, a daily newspaper with nationwide circulation of 1.1 million daily and Sunday circulation of over 1.6 million. It also publishes numerous national magazines and owns radio and television stations and a cable television system.

The Philadelphia Inquirer is a newspaper published daily by Philadelphia Newspapers, Inc. in Philadelphia, Pennsylvania, with a daily circulation of 502,507 and a Sunday circulation of 989,026 in the greater Philadelphia metropolitan area.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters

to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedom case litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Time Inc. is the largest publisher of general circulation magazines in the United States. It publishes and distributes *Time* magazine, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and, through its subsidiary, Southern Progress Corporation, also publishes *Southern Living* and *Southern Accent* magazines. *Time* magazine alone has a domestic circulation of 4.6 million.

The Times Mirror Company publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1,137,000 daily and more than 1.4 million on Sunday. Time Mirror also publishes seven other newspapers including *Newsday*, the *Baltimore Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News*, *Virginia Daily Press* and *The Times-Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

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No. 88-10

Supreme Court, U.S.

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DEC 1 1988

JOSEPH F. SPANGL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,
v.

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

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PETITION FOR CERTIORARI FILED JULY 1, 1988
CERTIORARI GRANTED OCTOBER 17, 1988

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-84-0257

DANIEL E. CONNAUGHTON,
Plaintiff,

v.

HARTE-HANKS COMMUNICATIONS INC.,
Defendant.

DOCKET ENTRIES

Date	NR.	PROCEEDINGS
2-15-84	1	COMPLAINT, JURY DEMAND—summons to atty for service
3-6-84	2	ANSWER of Harte-Hanks Communications
4-6-84	3	PRELIM PT ORDER: Discovery to be complete by 1-1-85; counsel to participate in such discovery as to be able to attend a settlement conf. Counsel to separately fill out and file the attached form. Packet issued
5-3-84	4	NOTICE to take depos by pltf
6-19-84	5	NOTICE OF DEPOS by pltf
6-19-84	6	NOTICE of depos by Pltf
7-16-84	7	TWO notices of depos by pltf

Date	NR.	PROCEEDINGS
7-26-84	8	ORDER: Pltf directed to show cause within 10 days why this case should not be dismissed for failure to abide by court order
7-27-84	9	MEMO IN response to (8) court order; settlement conf. after 10-84 by pltf
8-2-84	10	NOTICE OF DEPO BY PLTF
8-7-84	11	TRIAL CALENDAR—trial set during week of 2-25 to 3-8-85
8-16-84	12	Notice of depos by pltf
?-6-84	13	Notice of substitution of trial counsel—Creighton Esq. for Irwin Esq. for deft
12/21/84	14	(24) MOTION for summary judgment, and Rule 11 motion for fees and costs, by Deft several affidavits attached.
12/21/84		DEPOSITION of MARTHA JANE CON-NAUGHTON taken on 1/25/84, by Deft.
12/21/84		DEPOSITION of Daniel E. Connaughton taken on 1/24/84, by Deft.
12-28-84	15	NOTICE to take depos by pltf
1/4/85	16	(16) MOTION for extension of time to respond to doc. #14, by Pltf.
1/9/85		NOTATION ORDER by J. Rubin: doc. #16 is GRANTED until 1/22/85.
1/22/85	17	MEMORANDUM in response to doc. #14, by Pltf.
1/22/85		DEPOSITION of JAMES S. IRWIN, by Pltf.
1/22/85		DEPOSITION of ALICE THOMPSON, by Pltf.
1/22/85		DEPOSITION of JEANNE HOUCK, by Pltf.

Date	NR.	PROCEEDINGS
1/22/85		DEPOSITION of THOMAS TAYLOR GRANT, by Pltf.
1/22/85		DEPOSITION of LAUREL CAMPBELL, by Pltf.
1/22/85		DEPOSITION of JOSEPH COCOZZO, by Pltf.
1/22/85		DEPOSITION of WILLIAM SIEBERT, by Pltf.
1/23/85		DEPOSITION of LAWRENCE FULLERTON, by Pltf.
1/23/85		DEPOSITION of PAM LONG, by Pltf.
1/23/85		DEPOSITION of MICHAEL JONES, by Pltf.
1/23/85		DEPOSITION of ROBERT WALKER, by Pltf.
1/23/85		DEPOSITION of SUSAN KIESEWETTER, by Pltf.
1/24/85	18	ERRATA to doc. #17, by Pltf.
1/25/85	19	CORRECTED MEMO IN RESPONSE to doc. #14, by Pltf.
1/29/85	20	SUPPLEMENTAL FINAL PRETRIAL ORDER as req. by J. Rubin at PTC, by Pltf.
1/29/85	21	REPLY MEMORANDUM IN SUPPORT of doc. #17, by Deft.
1/29/85	22	FINAL PRETRIAL ORDER by J. Rubin.
2/15/85	23	LETTER from L. Dameron, J. Rubin's Chambers: Trial is rescheduled for Monday, July 29, 1985. CMT counsel/Mary V./

Date	NR.	PROCEEDINGS
4/12/85		DEPOSITION of JAMES L. BLOUNT, by Pltf.
7/17/85	24	ORDER by J. Rubin: Doc. #14 is DENIED.
7/17/85	25	JUDGMENT by Clerk regarding doc. #24.
7/17/85		PER LINDA DAMERON: The Law firm of KEATING, MUETHING, & KLEKAMP has been granted Leave of Court to take from Clerk's office the Deposition of MARTHA JANE CONNAUGHTON and DANIEL E. CONNAUGHTON for a time limit not to exceed 2 woking [sic] days which will be 7-19-85.
7/17/85	26	MOTION for use of special verdict, by Deft.
7-18-85		DEPOSITIONS: returned by KEATING, MUETHING, & KLEKAMP and are back in the possession of the Clerk's office.
7/23/85	27	MOTION In Limine, by Deft.
7/23/85	28	SECOND MOTION In Limine, by Deft.
7-26-85	29	Memo contra (27, 28) by pltf
7-26-85	30	Memo Contra (26) by pltf
7-26-85	31	MOTION IN LIMINE by pltf
7/30/85	32	NOTICE OF Voir Dire by Jury Clerk: Voir Dire is set for Friday, August 2, 1985 at 9:30 a.m. in Rm. 842 before Mag. Aug. Jury Clerk./Mag. Aug.
8/1/85	32A	BRIEF description of the defenses of the case, by Deft.
8/1/85	32B	VOIR DIRE questions proposed, by Deft.
8/2/85	33	REVISED order of witnesses, by Pltf.

Date	NR.	PROCEEDINGS
8/2/85	34	REQUESTED instructions to the jury, by Pltf.
8/2/85	34A	PROPOSED jury instructions, by Deft.
8-2-85	35	SECOND MOT. IN LIMINE by pltf
8-5-85	36	Memo Oppos (35) by deft
8-5-85	37	Memo oppos (31) by deft
8/5/85	38	CORRECTED MEMORANDUM IN OPPOSITION to doc. #31, by Deft.
8/5/85	39	CORRECTED MEMORANDUM IN OPPOSITION to doc. #35, by Deft.
8/6/85	40	MEMORANDUM IN OPPOSITION to doc. #34, by Deft.
8/6/85	41	MEMORANDUM on issue of burden of proof on falsity issue, by Deft.
8-12-85		DEPOSITION of David Berry taken 1-27-84 filed by deft.
8-15-85	42	CIVIL MINUTES: Trial to Jury First Day (8-5-85). Preliminary Jury Charge. Opening statement of counsel. Plaintiff witness called. L. Kuppin and D. Cook, reporters
8-15-85	43	CIVIL MINUTES: Trial to Jury Second Day (8-6-85). Plaintiff witnesses continued. J. Sammons & L. Kuppin, reporters.
8-15-85	44	CIVIL MINUTES: Trial to Jury. Third day (8-8-85). Plaintiff witnesses continued. J. Sammons & L. Kuppin, Reporters.
8-15-85	45	CIVIL MINUTES: Trial to Jury. Fourth Day (8-9-85). Plaintiff witnesses continued. Deft witness called out of order. L. Kuppin & J. Sammons reporters.

Date	NR.	PROCEEDINGS
8-15-85	46	CIVIL MINUTES: Trial to Jury. Fifth Day (8-12-85). Plaintiff witnesses concluded and rests. Deft motion for directed verdict DENIED. Deft witness called. L. Kuppin, reporter.
8-15-85	47	CIVIL MINUTES: Trial to Jury. Sixth Day (8-13-85). Deft witnesses concluded and rests. Rebuttal witness called. L. Kuppin, reporter.
8-15-85	48	CIVIL MINUTES: Trial to Jury. Seventh Day. (8-14-85). Closing arguments of counsel. Jury Charge. Jury Began deliberation at 11:30 and sent home at 4:30.
8/15/85		NOTATION RULINGS on Doc. #34a, Deft's proposed jury instructions, by J. Rubin.
8-16-85	49	CIVIL MINUTES: Trial to Jury. Eighth day (8-15-85). Jury deliberated until 4:30. Verdict. Jury to return for damages thursday 8-22 at 9 am.
8-16-85	50	JURY QUESTIONS answered and signed by the Jury.
8-16-85	51	JURY VERDICT. Find that PLTF WAS LIBELED by deft.
8-16-85	52	LIST of witnesses and depositions used in trial.
8/27/85		NOTATION ORDER by J. Rubin regarding Pltf's proposed jury instructions, (doc. #34).
8/27/85	53	JURY INSTRUCTIONS proposed by Deft. Harte-Hanks Communications with NOTATION ORDER by J. Rubin indicated individually.
8/27/85	54	TRIAL MEMORANDUM IN OPPOSITION to charge on punitive damages, by Deft.

Date	NR.	PROCEEDINGS
8/27/85	55	TRIAL MEMORANDUM IN OPPOSITION to punitive damage charge in absence of real malice, by Deft.
8-28-85	56	CIVIL MINUTES: Trial to Jury on damages. Ninth day (8-23-85). Opening statement by pltf. Pltf witnesses called. Deft witness called out of order. L. Kuppin, reporter.
8-28-85	57	CIVIL MINUTES: Trial to jury on damages. Tenth day (8-26-85). Pltf witnesses concluded and rests. Deft motion for directed verdict—DENIED. Opening statement of the deft. Deft witnesses called. L. Kuppin, reporter.
8-28-85	58	CIVIL MINUTES: Trial to Jury on damages. Eleventh Day (8-27). Deft witnesses concluded and rests. Closing arguments. Jury Charge. Jury began deliberation at 3:30 and returned at 5:45.
8-28-85	59	VERDICT: Jury awards damages to Daniel Connaughton as follows: Compensatory damages \$5,000; Punitive damages \$195,000; and attorney fees \$0 for a total of \$200,000.
8-28-85	60	JUDGMENT in a civil case in accordance with the jury verdicts.
8-28-85	61	LIST of witnesses and depositions used in the [sic] damage part of the trial.
9-06-85	62	(74) MOTION for JUDGMENT NOTWITHSTANDING THE VERDICT by deft.
9-06-85	63	(74) MOTION FOR STAY of execution on the judgment entered in this case filed by deft.

Date	NR.	PROCEEDINGS
9-10-85	64	Transcript of the Jury Charge on 8-5-85 filed by Linda Kuppin.
9-10-85	65	Transcript of Mr. Lloyd's Closing Argument on 8-5-85 filed.
9-10-85	66	Transcript of Trial Proceedings Vol. I filed by Linda Kuppin.
9-10-85	67	Transcript of Trial Proceedings Vol. II filed by Linda Kuppin.
9-10-85	68	Transcript of Trial Proceedings Vol. III filed by Linda Kuppin.
9-10-85	69	Transcript of Trial Proceedings Vol. IV filed by Linda Kuppin.
9-10-85	70	Transcript of Trial Proceedings Vol.V filed by Linda Kuppin.
9-10-85	71	Transcript of Trial Proceedings Vol.VI filed by Linda Kuppin.
9-25-85	72	RESPONSE to doc. #62 & 63 filed by pltfs.
10-2-85	73	Reply Memo in Support of Doc. #62 by deft.
02-06-86	74	ORDER by Judge Rubin that Doc. #62 is DENIED; Upon such determination the Mot. for Stay (Doc. #63) becomes MOOT.
02-13-86	75	(75) MOTION for STAY OF EXECUTION PENDING APPEAL by Deft. Harte-Hanks
02-13-86	76	SUPERSEDEAS BOND by deft. Harteke-Hanks [sic] Communications, Inc. acknowledge themselves (w/Liberty Mutual Ins. Co., a corporate surety) bound to pay to Pltf. Connaughton the sum of \$200,000 together with costs, interest and damages for delay, if appeal is dismissed or if judgment affirmed.

Date	NR.	PROCEEDINGS
02-13-86	77	NOTICE of APPEAL from Order denying its Mot for Judgment Notwithstanding the Verdict of 2/6/86 and from judgment on 8/28/85 by Deft.
02-18-86		NOTATION ORDER by Judge Rubin that doc. #75 is GRANTED.
2-21-86		Sent packet this date containing #60, 74 & 77
02-27-86		Ltr. by pltf's counsel to Court Reporter, L. Kuppin designating materials to be forwarded to Clerk for inclusion in record.
3-10-86	78	Acknowledgment of receipt fm cofa—their number 86-3170
04-21-86	79	Transcript of Trial Proceedings on Monday 8/12/85, Vol. V—L. Kuppin et rprr
04-21-86	80	Transcript of Trial Proceedings on Tuesday 8/13/85, Vol. VI—L. Kuppin, et rprr
04-21-86	81	Transcript of Trial Proceedings on 8/5/85, Vol VII—Tri-County Ct Reporting
04-21-86	82	Transcript of Trial Proceedings, Thursday 8/15/85, Vol. VIII—Linda Kuppin et rprr
04-21-86	83	Transcript of Trial Proceedings, Friday 8/16/85, Vol IX—L. Kuppin, et rprr
04-21-86	84	Transcript of Trial Proceedings, Friday 8/23/85, Vol. X—L. Kuppin, et rprr
04-21-86	85	Transcript of Trial Proceedings, Monday 8/26/85, Vol. XI—L. Kuppin, et rprr
04-21-86	86	Transcript of Trial Proceedings, Tuesday 8/27/85, Vol. XII—L. Kuppin, et rprr
04-23-86		Sent Record to Cofa this date containing 3 vols. of transcript, 16 vols. of transcript & 16 depos.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 86-3170

DANIEL CONNAUGHTON,
Plaintiff-Appellee,
vs.

HARTE HANKS COMMUNICATIONS, INC.,
Defendant-Appellant.

DOCKET ENTRIES

Date	FILINGS-PROCEEDINGS
1986	
03/03	1) NOTICE OF APPEAL, filed
03/03	2) LETTER—case opening [forms due 3/17]
03/03	3) TRANSCRIPT ORDER from court reporter (L. Kuppin); transcript ordered 2/20; est. 600 pgs; est. com. date 3/27; some transcript transcribed; fin. arrangem'ts made 2/20
03/07	4) APPEARANCE of J. Lloyd for appellee
03/10	5) APPEARANCE of R. Creighton for appellant
03/10	6) PRE-ARGUMENT STATEMENT of appellant (m-3/10)
03/28	7) MOTION: court reporter's transcript to 4/21/86 (m-3/27) (Motion Granted, JPH/kmp, bb)

Date	FILINGS-PROCEEDINGS
1986	
04/25	CERTIFIED RECORD, filed (03 plea; 16 tran; 16 dep.)
04/25	8) LETTER—briefing (6/9; 7/14; 7/31; 8/7)
06/09	BRIEF (10) appellant (m-06/09)
07/14	BRIEF (10) appellee (m-07/14)
07/31	REPLY BRIEF (10) appellant (m-07/31)
08/07	JOINT APPENDIX (5) (m-8/7)
11/20	9) LETTER/COUNSEL—ORAL ARGUMENT scheduled for 1/20/87
12/02	10) ADDITIONAL CITATIONS submitted by appellant (m-12/02)
1987	
01/20	CAUSE argued by Crieghton [sic] for appellant, by Lloyd, Jr. for appellee and case submitted to the Court (Before: Keith, Krupansky and Guy, JJ.)
07/08	11) ADDITIONAL CITE by appellant pje
1988	
01/28	12) JUDGMENT: affirmed, appellee to recover costs from appellant (Keith, Krupansky and Guy, JJ.)
01/28	13) OPINION by Krupansky, JJ., [Guy, J., dissenting]
02/11	14) PETITION FOR REHEARING/EN BANC of appellant (m-2/11)
02/11	15) MOTION of Cincinnati Enquirer, American Society of Newspaper Editors, Natil [sic] Assoc. of Broadcasters, Natl newspaper [sic] Assoc, Radio-Television News and Freedom of the Press for leave to file as amici curiae a memorandum in support of appellant's petition for rehearing en banc (m-2/11) GRANTED (Krupansky/bb)

Date	FILINGS-PROCEEDINGS
1988	
2/11	16) Memorandum of amici curiae, in support, of petition for rehearing of appellants for rehearing en banc (m-2/11) TENDERED Filed 2/11
2/25	17) ADDITIONAL CITATIONS by the appellant
03/01	18) LETTER: directing appellee to file response to petition for rehearing en banc by 3/15; response not to exceed 10 pages; 20 copies; no extensions will be granted
03/15	19) RESPONSE: appellee, to petition for rehearing en banc (m-3/15)
04/04	20) ORDER: petition for rehearing en banc (#14) denied (Keith, Krupansky, and Guy, JJ.)
04/06	21) MOTION/APPELLANT: stay of mandate (m-4/6/88)
04/13	22) ORDER: mandate stayed pending certiorari (Krupansky, J.)
07/08	23) NOTICE of filing Petition for Certiorari for writ of certiorari in Supreme Court (88-10) on 7/1/88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-84-0257
RUBIN, J.

DANIEL E. CONNAUGHTON,
119 Court Street,
Hamilton, Ohio 45011,

Plaintiff,

v.

HARTE-HANKS COMMUNICATIONS, INC.,
40 Northeast 410,
San Antonio, Texas 78216,

Defendant.

[Filed Feb. 15, 1984]

COMPLAINT WITH JURY DEMAND
ENDORSED HEREON

This is an action for damages for the malicious publication of libelous statements in the Journal News on November 1, 1983.

1. The plaintiff Daniel Connaughton is an individual citizen of the State of Ohio, residing in Hamilton, Ohio.

2. The defendant Harte-Hanks Communications, Inc. is a Delaware corporation with its principal office in Wilmington, Delaware and its principal place of business in San Antonio, Texas.

3. Jurisdiction is proper pursuant to 28 U.S.C. 1332 in that this is an action between citizens of different states and the amount in controversy exceeds ten thousand dollars (\$10,000.00), exclusive of interest and costs.

4. Venue is proper in the United States District Court for the Southern District of Ohio, Western Division pursuant to 28 U.S.C. § 1391(a) and Rules 2.1.2 and 2.1.7 of the Local Rules of this Court, in that the plaintiff is a resident of Butler County, Ohio and the cause of action arose in Butler County, Ohio.

5. Plaintiff Daniel Connaughton is and at all times relevant hereto was an attorney licensed to practice law in the State of Ohio; on November 1, 1983, plaintiff was a candidate for public office, namely, a position as municipal judge in and for the City of Hamilton, Ohio.

6. Defendant Harte-Hanks Communications, Inc., owns and publishes the Journal News, a daily newspaper of general circulation in the metropolitan Hamilton, Ohio area; the Journal News, in particular, is a division of Harte-Hanks Communication, Inc.

7. The plaintiff, on September 17, 1983, was present at and privy to an extensive interview, conducted at his residence, of one Patty Stephens.

8. Also present at the interview, which was conducted almost exclusively by David Berry, were the plaintiff's wife, Martha Connaughton, Jeanette and Ernest Barnes, Joseph Cox, and one Alice Thompson; the latter is Patty Stephens' sister.

9. The interview was recorded, in its entirety, by use of two separate recording devices; the substance of the interview is contained within three successive 60-minute cassettes of recording tape.

10. The subject matter of the interview, subsequently communicated to the Hamilton police department by

plaintiff, has led to grand jury indictments and ongoing criminal prosecution involving bribery charges against Billy New, former Director of Court Services for the office of James Dolan, judge of the Hamilton Municipal Court and plaintiff's opponent in an election for that position held on November 8, 1983.

11. On October 31, 1983, the plaintiff was invited to the offices of the Journal News for an interview. Plaintiff and David Berry were led to believe that the purpose of the interview was in aid of securing the endorsement of the Journal News in support of plaintiff's candidacy in the upcoming election for municipal judge.

12. During the course of the afternoon of October 31st, plaintiff and David Berry were interviewed simultaneously, in separate rooms. The subject matter of the interview concerned plaintiff's knowledge of the bribery allegations and the means by which he acquired such knowledge.

13. Concurrently, the defendant, by and through its various reporters, was interviewing other individuals who had been present during the September 17th meeting at the Connaughton residence, questioning them, *inter alia*, as to inducements offered Alice Thompson and Patty Stephens by plaintiff or on plaintiff's behalf.

14. Each person so contacted categorically denied that any promises or inducements had been offered.

15. Before the termination of the October 31st interviews at the Journal News offices, plaintiff presented to the Journal News a complete set of the cassette tapes adverted to in paragraph 9, *supra*.

16. On the 1st of November, 1983, the Journal News printed an article signed by one Pam Long. The article received front-page headline treatment under the caption, "Bribery Case Witness Claims Job, Trip Offered." A copy of said article is attached hereto, marked as Ex-

hibit A and incorporated by reference as if fully rewritten herein.

17. The article asserts, *inter alia*, that plaintiff employed "dirty tricks" in eliciting statements from Alice Thompson, that plaintiff offered jobs, trips and other inducements to Alice Thompson and her sister Patty Stephens to elicit statements respecting the aforesaid bribery allegations, is libelous per se in that it imputes unethical behavior to the plaintiff as a lawyer and portrays the plaintiff, both expressly and by innuendo, as a person unfit for public office.

18. No effort was made by defendant to contact or interview Patty Stephens before publishing the November 1 article.

19. The defendant did not listen to the tapes which had been furnished them by plaintiff on October 31st prior to publishing the November 1 article.

20. The defendant, between the time of publication of the article and the election of November 8, cancelled an interview with Patty Stephens.

21. The allegations in the article which the defendant made concerning the plaintiff are false.

22. The tapes presented to defendant on October 31st and the statements of Patty Stephens reveal that the contents of the article are false.

23. The allegations of the article were made with actual malice in that the defendant published the article in reckless disregard for whether the statements were true or false, and with the intent to injure plaintiff's reputation and to prevent his election to the Hamilton Municipal judgeship for which he was a candidate in order to ensure the reelection of incumbent James Dolan.

24. The publication of the article has substantially damaged the plaintiff's reputation, not only personally

but professionally and politically, has prevented his election to the judicial position for which he was a candidate, and has caused him to endure extreme humiliation and mental and emotional distress.

WHEREFORE, plaintiff prays for damages against the defendant in the sum of Ten Million Dollars (\$10,000,000.00), and for all other relief to which he is entitled including punitive damages, reimbursement for attorneys' fees and costs of this action.

Of Counsel:

Lloyd, Frank & Weissenberger

/s/ John A. Lloyd, Jr.

JOHN A. LLOYD, JR.

ARMIN FRANK

Trial Attorneys for Plaintiff

414 Walnut Street, Suite 610

Cincinnati, Ohio 45202

(513) 381-7200

JURY DEMAND

Plaintiff demands a trial by jury.

/s/ Armin Frank

ARMIN FRANK

EXCERPTS FROM TRANSCRIPT OF RECORD
[TESTIMONY OF JAMES L. BLOUNT]

* * *

[51] Q. Do you remember when Judge Dolan came to see you sometime during that campaign with reference to being [52] interviewed by the Cincinnati Enquirer?

A. Yes, I believe that would have been on the 25th, which would have been two days before publication of the story in the Enquirer.

Q. What did Judge Dolan say to you then?

A. Well, he covered several things. He first started by asking some questions about procedures for press conferences and whether—who could be expected to attend, that type of thing, if people would attend. I think he was looking for information. Number one is, as to whether we would attend the press conference if he called it. We talked for several minutes about what is a press conference in the eyes of the press, what's a press conference in the eyes of a person who calls a press conference. Those two don't always match up.

Q. Did Judge Dolan tell you he was concerned about some interviews that he had had with representatives of the Cincinnati Enquirer?

A. I don't think that's exactly the case. I think he confided to me that he had not—he felt he had not been interviewed by them, but had been told that there would be a story in Thursday morning's edition on page one, and as he related to me, he felt like he had been threatened that if he didn't cooperate with the Enquirer and give them some information, that that story and others might do him some [53] damage.

Q. You were acquainted with Judge Dolan, were you not?

A. I've known Judge Dolan, yes, when he was a lawyer, as a candidate and had interviewed him, have been in his courtroom as an observer.

Q. The Journal News had endorsed him?

A. Gave him an endorsement when he ran the first time, six years previously.

Q. You took your journalism class at Miami to observe his courtroom operation, did you not, sir?

A. That's correct, because that was the only courtroom at the time we had an opportunity to visit, the only one that was in session.

* * *

[56] Q. Would you take a look at Plaintiff's Exhibit 1? Would you hand Mr. Blount that exhibit?

Can you tell us what that is, sir?

A. This is a column which was published, there's no date on it. To my recollection, it was published on Sunday, October 30th. This is undated. I'm assuming we are talking about the same one. The column which I wrote commenting on the election and the particular, the Municipal Court election.

Q. In that, you say, calling your attention to column three, the material that appears under your picture, "In the process, the motives and credibility of the Cincinnati newspaper are also in question," do you not?

A. That is one sentence in that rather long story which that's well over half the way down, yes. I think the paragraphs right before that put it in a little different context than you are presenting. It says, "Another potential loser is the media—especially the Journal News."

THE COURT: Let the witness finish his answer.

THE WITNESS: Which reads a little different when you take it out of context. Says, "Another potential [57] loser is the media—especially the Journal News and the Cincinnati Enquirer. Stories on the Dolan-Connaughton fight in the Enquirer last week certainly helped fuel the fire. But in the process the motives and the credibility of the Cincinnati newspaper are also in question. Some observers are asking how the Enquirer can justify the

placement of a story critical of Dolan at the top of page one, Thursday morning, October 27th, two days after U.S. forces participated in the—

THE COURT: Mr. Blount, I think you are going beyond.

Q. I was going to ask him, if permitted, to go and read the rest of the column.

THE COURT: If you have no objection.

THE WITNESS: I'm trying to answer exactly.

THE COURT: No problem.

THE WITNESS: To go back to this paragraph. "Some observers are asking how the Enquirer could justify the placement of the story critical of Dolan at the top of page one, Thursday morning, October 27th, two days after U.S. forces participated in the invasion of Grenada, a day after the legality and necessity of the military action was questioned or condemned by some members of Congress and U.S. allies and while the nation was still angered by the deaths of 225 U.S. Marines, in a terrorist explosion last Sunday.

[58] "Judge Dolan suggested an answer when he charged Jim Delaney with threatening a page one smear Thursday morning if the judge didn't cooperate with the newspaper and its reporter, Karen Garloch, and if the judge didn't cancel a press conference opened to all media scheduled for Thursday afternoon."

I think that probably I can go on and read it.

Q. Read the next paragraph.

A. Says, "Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to Enquirer decision-makers."

Q. Let me ask you some questions. First of all, would you say that it was somewhat of a departure from customary practice to criticize another newspaper in its placement of a story?

A. Well, again, I think you are suggesting I was criticizing the Enquirer. I started out by including the

Journal News as one of those that stood to lose in this rather complicated election. Yes, it is somewhat unusual, but it's not the first time it's happened. Newspapers sometimes get into a little contest with each other. That was not the intent of the column. The column, as I said before, you are talking about really the tail end of the column.

The first part of the column talks about the [59] dilemmas facing candidates, facing the county prosecutor, facing almost everyone who had any connection at all with this. It was a very complicated campaign.

Q. As of the twenty-seventh, excuse me, yes, the twenty-seventh, the day the Enquirer broke this story, would this be the Enquirer story that was the biggest, most prominent story that any newspaper wrote about the Municipal Court in Hamilton up to that time?

A. Probably. We had covered it just two days before, with two guest columns from candidates. We had been covering several aspects of it over time. It was probably about the first time that the Enquirer had mentioned it except to list the candidates from time to time—it was probably—Let's put it this way, it was probably one of the most spectacular stories at that time.

Q. A more spectacular story about this in the Journal News had run, right?

A. I don't know, if you consider the resignation of Billy New. We had that story a month before this in our afternoon edition. The Enquirer had it in the morning. I think that was probably the most startling story in this whole campaign, his resignation.

Q. After that time, the Enquirer and the Journal News had the two papers of that largest circulation in the Hamilton community?

[60] A. In the Hamilton area, yes.

Q. Was Journal News, as of that time, did the Journal News have a larger circulation than the Enquirer?

A. Yes, in the area served by this court.

Q. In other words, as veteran newspapermen familiar with the Hamilton community and the impact of newspapers on Hamilton voters and residents, did the Journal News have a greater capacity to influence public opinion in Hamilton than the Enquirer did?

A. I would like to think so, except you never know if anyone reads what you write and, second, if it has any impact on their thinking. You are asking me to draw some conclusions for about a hundred thousand people and I can't do that.

Q. As a matter of fact, you rather resented the Enquirer's big story on this issue, didn't you?

A. Not at all. I had no resentment at all. I have nothing to resent. I'm a former Enquirer employee. I read it faithfully, both professionally and because I enjoy reading it. I have no resentment on the Enquirer.

We like to get a story ahead of them, but it's like the Bengals and the Steelers. Sometimes the Steelers are going to win and sometimes the Bengals are going to win.

Q. Do you regard that exercise as kind of a contest between the two papers, who is going to win?

[61] A. No. Certainly, we like to have more than they do, but it's not like we are out there every day trying to one-up on everyone. It's not always who comes out with the story first that counts. There are a lot of stories that we know that they are going to get because of just the timing. They are a morning paper, we are an afternoon. Sometimes we feel that we have more time to develop the story and do a better job even though they had the story first and vice versa. Time is a factor. There's a lot of things that influence a story.

Q. Looking at the last paragraph of that column, "Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to Enquirer decision-makers." What was that all about?

A. Well, that goes into rumor that has been circulating from probably shortly after Dan Connaughton filed his petitions for candidacy for office. Had to do with directly with a woman who was working in his behalf, who had been a former employee of Judge Dolan and, of course, says that it's an unproven suggestion, unproven rumor that had been going around. Does not express it as fact. That the rumor was fact. That had to do with this woman's daughter marrying the son of a former owner of the Cincinnati Enquirer and people construing through that, that even though that [62] person was no longer owner of the Enquirer, that there was some connection some way that that person could bring some influence directly on the campaign through the Enquirer and, of course, as we know, with rumors and folktales and legends, they have many forms, that this person would possibly be a large contributor to the Connaughton campaign before the election was over.

Q. Who was this person?

A. The person was mentioned by name through all these was Carl Lindner, who had been the owner of the Enquirer at one time.

Q. Did you do anything to verify whether this was true before you wrote it in this column?

A. The rumor was certainly true. I didn't have to verify it. I heard it many, many times. It had been discussed at political meetings with Mr. Connaughton and Mr. Dolan were there. Mr. Lloyd, it's an unproven suggestion, knowing Mr. Lindner, he was not going to talk to me.

I had talked to Ray Nardine, who would have been the grandfather—father of the woman who worked for Judge Dolan and would have been the grandfather of the woman who was married to Carl Lindner's son. He talked about the rumor. Knew about it. As to the question of whether there was any campaign contribution or not, he didn't know of any, but we also talked about the possibility at that time that [63] there was still time for campaign contributions.

Q. He told you he had no basis to confirm it?

A. That's correct, or deny it.

Q. Did you ask Mr. Ryan about the—

A. Mrs. Ryan?

Q. Yes.

A. No.

Q. Did you ask her daughter?

A. Her daughter?

Q. Yes.

A. No, I did not.

Q. The person married to Mr. Lindner's son?

A. This column was not commenting on whether the rumor was true. I am just saying this was one of the rumors in the context of this campaign which made the Enquirer story appear even more unusual to persons in the community who had heard the rumor about the so-called Lindner connection.

Q. In other words, your suggestion here was the Enquirer was running a story critical of Dolan because Mr. Lindner had an interest in the election of Mr. Connaughton?

A. I'm not saying that. I'm just saying this was one of the stories that was circulating in the community. Comes to no conclusion as to whether it was or was not. Certainly was fact that that rumor was very prevalent in the community, many times kind of peaked and valleyed several [64] times during the campaign and the publication on the twenty-seventh revived the rumor instantly.

Q. Was it your normal practice to publish unconfirmed rumors?

A. Again, I specify that the language that I used was that it was an unproven suggestion.

Q. Can you answer that question?

A. Can I answer that question?

Q. Yes.

A. There are various rumors, most stories that originate in a newspaper come from a rumor and in

some way are verified. We are not talking about a news story. We are talking about claims in the community and just basically laying out some of the very strongest things that were being said.

Mr. Connaughton had, I'm sure, had heard this rumor before and associated it with his campaign. Had never, in our very frustrating contact with, had never asked us in any way to print a denial or come forward with a denial.

Q. Would you acknowledge that the publication of an unproven rumor would have a capacity to damage someone?

A. Depends on what the rumor is. A rumor can also help the person. Depends on the mind of the reader at that time. Here again you are asking me to make an interpretation for others which I would rather not do.

[65] Q. Well, okay. Now, would you next turn, would you hand the witness Joint Exhibit I, please?

Do you see that, sir?

A. Yes.

Q. What is that?

A. This is the story that was published in the Journal News on Tuesday, November 1, 1983.

Q. You are familiar with this story?

A. Am I familiar?

Q. You are familiar with it?

A. Yes.

Q. You played a role in the inception of it and the development of it, did you not?

A. Yes.

Q. You participated in the conference along with others finally to approve the publication of it, is that right, sir?

A. That's correct.

Q. Tell us about the occasion when you and Pam Long had an interview with Alice Thompson, will you please?

A. I would rather start that before the interview and how it came about.

Q. I don't care.

A. Put it in the proper context.

Q. You tell us everything you know about it.

[66] A. Somewhere in the vicinity of, well, let's go back. The conference to which you are alluding was the morning of October 27, Thursday, October 27.

Q. Excuse me. That's the morning the Enquirer article about Dolan came out?

A. Yes. Approximately a week to ten days before. As I was leaving my office to go to another part of our building, I encountered a person by the name of Hank Masana, a lawyer in Hamilton, who was coming into the building and right away asked if he could talk to me.

Q. Was that that morning?

A. No, no, we are talking about ten days, probably a—might have been two weeks. It did not appear on my calendar because it was not scheduled. I was on a tight schedule because I was interviewing candidates. This was a time I allowed myself a breather to do some other work and I was—we met kind of at the doorway.

He said that he had something he wanted to talk to me about and wanted to talk in confidence. I assumed that it had something to do with either Billy New or with the election for Municipal Court and was correct and asked him at that time if he would mind the publisher being part of the meeting, Joe Cocozzo, because naturally, we talked frequently about various developments in the campaign, so on and so forth. What it had come down to was that Masana said that the person [67] wanted to talk to us, did not know if she could approach us or how she could approach us, that he was acting as kind of an intermediary to, number one, see if we would be interested in talking to this person, and if so, to see if something could be arranged.

Q. You told me you and Mr. Cocozzo, the two of you were together in a meeting that was held at the Journal News?

A. We went in the publisher's office for that meeting.

Q. Did you know at that time that Mr. Masana was Billy New's lawyer?

A. Yes, very much. As I said, when he walked in the door I assumed that when he said he wanted to talk to me, that that's exactly what he was there to talk about.

Q. Billy New was a person, bailiff in Judge Dolan's court?

A. Director of Court Services was his correct title.

Q. He had resigned?

A. He had resigned approximately a month before.

Q. What that the subject of a Grand Jury inquiry?

A. The Grand Jury was scheduled to meet, I believe the thirty-first of October or the first of November.

Q. You knew all that when you and Mr. Cocozzo talked to Mr. Masana?

A. Yes, I've known Mr. Masana for many years and [68] dealt with him many times on other matters.

Q. Go ahead.

A. Out of that came the arrangement to meet with a woman by the name of Alice Thompson, whose name we recognized as one of the persons who had been subpoenaed before the Grand Jury.

Q. But Mr. Masana asked you to meet with Alice Thompson?

A. I wouldn't put in that particular language. He was there to inquire if we would be interested in meeting with her. I'm not sure if it was said then or said later, something to the effect that she had tried to talk to the Enquirer and they weren't interested in listening to her.

Q. As a matter of fact, she told you that?

A. She told us that to—

THE COURT: Let him finish his answer.

A. That she had some things to talk about. Our concern that the point was that we didn't want to delve into the Grand Jury's work. Our basic philosophy is that when the system works, we report it. When it

doesn't, then we try to in some way report it and at that time, there was nothing to indicate that the criminal justice system regarding Billy New having a Grand Jury hearing and so on and so forth was not going to work. In fact, it was all occasions that it would be some handling of his case and some decision by the Grand [69] Jury before the election, which was one of the things discussed in that column.

Q. May I ask you a question? My turn.

Did you know at that time, were you told by Mr. Masana that this woman that wanted to talk to you was a witness who was subpoenaed to be before the Grand Jury?

A. When I mentioned the name I had seen, by that time, I think in fact, again, I'm not sure of the date that he came into the office, but I believe it was possibly even the day after the publication of the list of people who had been subpoenaed, twenty-five.

I had had some indication from others who these people were and what their background was and so on and so forth. The name was not unfamiliar to me. I knew she was a Grand Jury witness. That's one of the things why we discussed at that time—we were not there to do the Grand Jury's work. That we would listen to the woman, we could not promise whether we would publish the story or anything of that nature but we would be willing to listen to her. It was still at that time a little fuzzy as to what the subject matter would be. Had something to do with she felt she had been tricked and that some promises had been made to her that were not being kept regarding her name not being made public.

* * *

[72] Q. After that conversation, what steps did you take if any to set up the interview with Alice Thompson?

A. We agreed we would listen to her. That was the only agreement we had made at that time. This was of course Mr. Cocozzo and myself. And that the next step

would be for either Mr. Masana or someone, the woman or someone to call and arrange a time and place and a date. Mr. Masana was not too sure of scheduling and so forth and we kind of left it there, that he could get the word back, yes, that we would at least listen. We couldn't promise that there would be anything come of it.

The reason to start that I think I said it was about ten days before the interview. I believe that Mr. Masana was going to take a few days' vacation. I think that came out at that time and so that it was several days before the time was set. I believe it wasn't set until Monday or Tuesday, the twenty-fourth or twenty-fifth of October.

Q. In any event, you did have an interview with that lady on the twenty-seventh, did you not?

A. Yes.

* * *

[78] Q. Mr. Blount, she told you in the course of this interview in connection with discussing or saying what Dan Connaughton is supposed to have said to her, that Dan's voice isn't on the tape. I don't want you to take my word for it. Would you look at page twenty-four of this transcript, please.

A. If I remember that without looking at the transcript.

Q. She said, "I don't think Dan's voice is on it," remember that?

[79] A. Yes, this was in regard to I think, again, if we go back to some of the previous pages, we were talking about whether Dan's voice was on there in regard to things like trips and jobs and meals and restaurants and things of that type. I don't think it's an overall statement that his voice is never on the tape in regard to anything.

Q. Let's—

A. I think that question was asked of her again and I think it's clarified somewhere in there.

Q. Would you look on page twenty-eight. Did she not say, "Like I said, though, the tape recording was off when Dan spoke."

A. How far down the page? Twenty-eight, you say?

Q. This doesn't have numbers on it on the left-hand side. Most of these deposition papers do. It's in the middle. You asked, "Was it Dan Connaughton himself who talked about the trip?" She said, "Yeah, he did most of the talking in the living room. Like I said, though, the tape recording was off when Dan spoke."

A. That's right.

Q. Would you look at page thirty-one, please?

You say where—see where she said near the top of the page, "But like I say, if you listen to the tape, you are not going to hear it because his voice ain't on the tape."

A. That's right, don't you have to go back, I think, [80] to what we are talking about at that time and that was the trips and the jobs and things of that type. It was in that context. It was not in the context that his voice would not be heard on any of the tape.

Q. Did you ever listen to this tape before this article was prepared and published?

A. The tape?

Q. The tape of the interview or the tapes of the interview—

A. There were three tapes, not one.

Q. Well, there may have been, yeah, I won't dispute that. Three tapes. Any of the tapes—

A. Three tapes and multi-copies.

Q. Would you let me finish, please? Did you listen to any of the tapes of the interview conducted by Dan Connaughton with Miss Stephens and Miss Thompson on the 17th of September? Did you listen to any of those tapes before you approved and published the article about Dan Connaughton on the figures of November 18, 1983?

A. No, because we had from several sources what was on that tape, there was several sources including

Mr. Connaughton, that there was no mention of things we were exploring at this time?

Q. My question to you is, you acknowledged that you said on a number of occasions that Dan's voice is not on the [81] tape?

A. Regarding trips and jobs and so on.

THE COURT: Mr. Blount, you must let Mr. Lloyd.

Q. You were, I presume, concerned that you were dealing with a credible person in Alice Thompson, were you not?

A. Correct.

Q. Wouldn't one of the simplest ways to determine her credibility be to play the tape to see whether her statement that Dan's voice is not on it is true?

A. No, because we had been told from other sources that this matter, as I previously said, saying it was not on the tape. This was not discussed on the tape. We had been told by other persons that the tape was junk as far as evidence.

Q. The tape was what?

A. Junk.

Q. So you don't think that—or you didn't then think it would be useful to you in order to determine her credibility to listen to any of the tapes made during that entire prolonged interview, the nature of the 17th of September where she was supposedly involved?

A. Out of curiosity, yes. I probably would have liked to have time to listen and listen several times, but [82] out of necessity no, because I, again, had been aware of the tapes. Before Miss Thompson mentioned the tapes, I had asked—in fact, several people had called me to tell me or ask why we weren't doing something about it, so on and so forth. I had asked questions about these tapes and as I've answered, was told by people who had been involved in the investigation that the tapes were junk and, in fact, that the only thing on the tapes were mention of things that had happened in Municipal Court involving Billy New.

. . . .

[84] Q. On page fifty-seven, you said that, if you will follow this with me, "Obviously, we can't quote your sister. What's your sister's position in this? Would she support you or would she support him? In other words, if somebody said to her who is telling the truth." Remember that?

A. Uh-huh.

Q. Then Miss Thompson, is this the answer, "She will tell you about the trips, the dinner at the Maisonette, the job, everything. She will tell you the truth because he offered it to her too." Remember her saying that?

A. Uh-huh.

Q. Then you asked, "Does she know that you are here today?" The answer, "I haven't talked to her today." Then you asked, "Did she know you were planning on getting with us." And then following on the next page, "I kept on telling [85] her, you know, that I was going to talk to the Journal News, listen to everyone. Get the whole story," and she goes on and on. But it did occur to you, didn't it, sir, during the course of this interview that it would be very important to talk to Patsy Stephens to see whether she would, as you say, support you, that is, her sister, or support him, I suppose that's Connaughton?

A. At that time it would have been interesting to hear her comments but there were some developments later on which changed the whole importance of her views.

Q. Later on, you decided it wouldn't be important to—

A. No, that's not the case—

Q. To see what Patsy Stephens said?

A. We hoped to talk more. What I'm saying is that some things that transpired later on, specifically the interview with Mr. Connaughton, some of the things he said in that interview, made Patsy Stephens really a big player in this.

Q. Patsy Stephens was the main player so far as supplying information about Billy New in the operation of Judge Dolan's court, wasn't she?

A. That is correct, we knew that.

Q. Alice Thompson was kind of an excess baggage, just went along with her sister on these occasions, didn't she?

[86] A. That's your judgment. I don't know if I can draw that exact—

Q. Well, did you ever listen to at any point to the tapes of that Long interview that Mr. Connaughton and his people had with Thompson and Stephens?

A. Did you ever before the article was published?

Q. Not at any time?

A. I listened to about fifteen minutes of it later on.

Q. To this day as you sit here, you still have never heard more than fifteen minutes of that—

A. That's right, because I took the word of trusted law enforcement officers and others that what was on the tape and what the subject matter was and also their, as I said, one or two of them said, the tapes were junk. That's what they said. As of any kind of evidence or proof, they were junk.

Q. Who was it told you the tapes were junk?

A. I don't remember—one of the Hamilton detectives had made that comment. I believe when I had talked to John Holcomb the county prosecutor, he also relayed that—I don't know if he used the word junk. He may have said worthless.

Q. Didn't he use a tape in front of the Grand Jury to get an indictment?

A. Again, we are talking about two [87] different matters. We weren't investigating Billy New. As I explained before, we were not going to do the Grand Jury's job of investigating Billy New when the system was working. We were exploring more the question at that time and the question wouldn't come out because of the secrecy of the Grand Jury was how Mr. Connaughton

got his information. When he got it and if he had to do anything to get it. Those were questions that had been circulating in the community for months.

Q. You think that maybe the tapes were junk for one purpose but not for another?

A. I'm saying that I think the Grand Jury relied on the direct testimony of the people, not on the tapes. The police certainly didn't rely on the tapes. In fact, they went out and interviewed the people on their own and submitted their own written reports. They didn't go on the basis of what Alice and Patsy said on the tapes. I can't tell you—the Grand Jury was a secret proceeding I wasn't privy to.

Q. Would you look at page sixty-two of the transcript, please? Defendant's Exhibit J.

Do you have that in front of you?

A. Uh-huh.

Q. See where it says, Mr. Blount, "What would happen," this is you, "What would happen if we called your [88] sister? Would she talk to us, or would she be upset with you, or would she be upset with us or both of us or . . ." Then she said, that is Alice, said, "I think she's scared right now to talk to anyone because Cincinnati Enquirer has been trying to get her to talk to them. She's getting scared now since this is all reality. My sister is, she's kind of weak-minded when it comes to anything like that. She won't do nothing for nobody unless she thinks she's benefitting. Unless she was getting a job out of this and would make something of herself out of this."

Your comment is, "Used her all the way. Now she's seeing it. It's coming to where she ain't going to get nothing out of it. She's caught up in the middle of this. She's scared."

Do you remember that?

A. Sure.

Q. Based on that statement that Alice made, you say, you didn't think it was important talk to Patsy Stephens to see whether Alice told the truth?

A. I'm saying as our work on this story unfolded Patsy Stephens went from being a person that we would put high on our list to talk to, to a person that was on the periphery of the story. That all changed on the basis of Mr. Connaughton's words and actions on the thirty-first.

* * *

[92] Q. Did you bear in mind as you were evaluating the credibility of Miss Thompson that she had a criminal record?

A. Yes, in fact, I think that's in the transcript here where she goes into some detail about it.

Q. She had twice been convicted of crimes in the Hamilton Municipal Court?

A. I think one was shoplifting and one was assault.

Q. One involving an act of deception, shoplifting?

Q. Do you regard a person who is potentially deceptive who's been convicted of shoplifting?

A. I don't know if I can draw that conclusion. You are asking me to draw a conclusion on a lot of facts that I wasn't privy to. I'm not trying to be evasive.

THE COURT: You may proceed. You are answering appropriately.

Q. You were aware, were you not, that she had some psychiatric problems in her background?

A. There were rumors to that effect and of course when we pressed Mr. Connaughton on whether he had checked that out, he couldn't—psychiatric records and treatment [93] are not something that is a public record so it's not something we can check out.

Q. You were aware that she was a person who had joined with others in giving testimony, at least the prosecutor thought was important enough to bring in

front of the Grand Jury which was considering indicting Billy New, you knew that?

A. Sure, the prosecutor told me that she was one of the most credible witnesses he had.

Q. You also knew that she was talking to you because she was uncomfortable that her associates or some people she knew would think poorly of her as a result of that?

A. That was one element, yes. She had thought that her name would not be used in public and that she thought that she had some promise from Mr. Connaughton in that regard.

[109] Q. Would you turn to page 88, please?

Does this question appear on page 88 or did I ask it? "And you can't give us any detail about the attempts that were made by Pam Long to reach Patty Stephens?" Remember that?

A. Uh-huh.

Q. Was this your answer? "Not in any detail. Again as I said, I was present when they were talking at one time. I was informed of two scheduled meetings and, as I said, I re-arranged my schedule so I would be available. In fact, one or both of those were probably going to be held in my office so that there would be some privacy. I know they didn't transpire, let's put it that way, we were there. We were available, we were expecting her. She didn't show."

Do you remember giving that answer?

[110] A. Yes.

Q. Would you turn to page 129 of that deposition, please, Mr. Blount?

Do you see in the paragraph that begins on that page, you said—and there's more here than that, but I'm not trying to eliminate it, but I'll ask you this. Did you say, "I personally was present on the thirty-first when Pam Long was on the phone talking to Patty Stephens"?

A. Are you on page 129?

Q. Page 129.

A. What was—

Q. Well, let me read you the rest of it. You said "I believe, I'm not certain, but I believe there was some effort to contact her before that because I think if you go back to the transcript, which you just recited, there was some question about Patsy Stephens on there. I don't know. I think it was after the tape recorder was off."

Then you go on to say, "But we got from Alice the phone number where she said she could reach Patty Stephens and I believe Mrs. Long tried to contact her either on that Thursday or Friday, but I personally can say that I saw or overheard Pam Long talking to her on the afternoon of the thirty-first."

A. That's my impression at the time.

Q. Did you instruct someone, reporter for the [111] Journal News to ask the police whether Alice Thompson told the Hamilton police what she told you about Dan Connaughton making promises and offers to her?

A. Not in those words, no. I did ask the police report to check some things on Alice Thompson with the police department, yes. Not as you say.

Q. Do you remember saying you told Tom Grant to ask the police if Thompson told them the same things that she told you?

A. Yes, generally, uh-huh.

Q. That is what you asked him to do is check with the police to see whether Alice told them about Dan's promises?

A. If there had been any, yes, if she had tried to tell that story, yes.

Q. Do you know whether he did that or not?

A. He asked about her credibility. He got kind of a blanket answer from them. That there was an investigation. was contending something to that effect. He did report back to him in that respect, yes. That's one of many checks we did.

Q. But he couldn't verify from them that she made such a statement to them, could he?

A. I don't think Tom Grant did, no, uh-huh.

Q. You don't think anybody else did?

[112] A. I had talked to some police officers.

Q. What police officers did you talk to?

A. I talked to so many at that time it would be hard to name them by name. I talked to—in that period, for various reasons, I was talking to quite a few of them.

Q. About Alice Thompson's credibility generally?

A. Yes.

Q. Not specifically about whether she told the police those things she told you about Dan Connaughton?

A. There were a lot of discussions going at that time with a lot of people. I probably talked with more than one police officer about not only her background, but did she try to tell the story to them.

Q. Did they remember the story?

A. To the best of my recollection, we got the positive response there that with an explanation as to why they were interested in listening. The direct answer is yes, at least one or two other expressed to me remembering.

Q. Would you turn to page 123 of the deposition?

[113] Q. Do you see the question toward the end of the bottom of page 121? "Did you ask or anyone else from the Journal News ask anybody from the Hamilton police whether Miss Thompson told them the same things she told you about inducement for Mr. Connaughton?" Do you see that?

A. Yes, sir.

Q. Was your answer, "Tom Grant, who was our police reporter and in daily contact with the police department was asked to ask that question starting with, I believe, the chief and then get the chief's permission to follow it as far as he could." Then continuing, your answer, "Mr. Grant's report back to me was they did not pursue that line of questioning. They were only interested in Billy New in court. They were not interested

in what Mr. Connaughton had done or had not done. They did not, as I recall, did not recall her saying that. But as I recall, they said they were not interested and their assignment from Mr. Landrith, through the chief, was to follow the information provided by Mr. Connaughton."

Then I asked this question, didn't I, "It would be true then that of all the people the Journal News interviewed, no one corroborated Alice Thompson's story that Mr. Connaughton made those inducements to her?" Then your answer to that was, "Mr. Connaughton used the key words mentioned, right."

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[583] Q. How long have you known the plaintiff, Dan Connaughton?

A. Probably in the vicinity of twenty-five years. I've known of him. I don't know if we knew each other during all of those twenty-five years. I would say we have known each other somewhere in the vicinity of twenty. I've known of him in high school because of his athletic background and my athletic background.

Q. Do you now or did you on November 1, 1983 bear any animosity towards the plaintiff?

A. No.

Q. Would you tell the jury your view of the import of the judicial seat for which this election contest was waged?

MR. LLOYD: May we hear the question?

THE COURT: Read the question, please.

(Question read back.)

MR. LLOYD: Okay.

A. The Hamilton Municipal Court covers not only the city of Hamilton, but the two surrounding townships, Ross [584] Township and Sinclair Township, so it is the basic court, the more or less people's court for approximately one hundred thousand people. It's the court they

are most likely to come in contact with if they have some problem with the law, such as traffic offense, things of that type. It's volume, as I recall, at this time was in excess of twenty-three thousand cases a year, which is substantial. I don't remember the exact ranking, but I believe it was among municipal courts and courts of that level, it was in the top five or six in the state in volume, with one judge. So it's important not only because of the volume of cases, but because it's the court that the ordinary citizen is most likely to come in contact with, the people's court.

Q. About how many patronage jobs or jobs that the judge who is elected, how many jobs are there that he has control of?

A. I'm not sure of the exact number. When you start to count such things as acting judges, you could get as high as thirty, I assume. I would say twenty is a comfortable number and probably up to thirty.

Q. In your own words, would you tell us how this campaign unfolded, from your viewpoint?

A. The campaign really started before there were any candidates or any candidates who had filed. It started back in probably late February or early March of 1983 with a lot [585] of rumors about who was going to run and why and what was happening in court. That was one of the times when the name of Billy New started to surface. It had surfaced at probably a year or two before, probably a year before and then had subsided, but then somewhere in the end of February, first part of March of 1983, the rumor started and then, of course, by the end of the month, March, Mr. Connaughton was a candidate, and it at first looked like it was going to be an interesting race, but just one of about seventy and of course as the summer went on, as the rumors and the innuendos and speculation and so forth increased, it overwhelmed all the others very quickly. By Labor Day, it was the focal point in the minds of anyone who was paying any attention to the political scene at that time.

Q. Does the Journal News have a fairness guideline on the publication of new claims in political elections?

A. Yes, we have a guideline that we have tried to follow. Incidentally, we put it in in the election, right after the election of 1971. We started with one before '71 and after the election of '71, we sat down and tried to write, with the advice of our attorney and also others, some type of a guideline that would get away from the so-called late hit. It had been the practice and politics in Hamilton, particularly for many years, back from my childhood when I first became interested in politics, to see candidates run [586] advertising both in a newspaper and on the radio on the last day. In other words, Monday with the election to be the next morning. In effect, that gave the opponent no chance to answer or to countermand or to get his or her word in in reply, and I just felt that for various reasons we should try in some way through our own standards, news and advertising, create some state of fairness.

So we established some rules that said no new charges after the Tuesday before, also that we would try to publish any endorsements, if any, no later than that time. It worked, I think has worked effectively to kind of snuff off some of the late hit or late charge politics that had been the norm.

Q. What was your role in the coverage of the political campaign of 1983, very briefly?

A. I was probably the person who was the overseer of the whole thing and very much involved in it. I was the person who was going to prepare for the publisher's approval, our endorsement editorials. I interviewed most of the candidates. We don't interview all the township candidates, but we interviewed candidates in the cities of Hamilton and Fairfield and major school boards in our area. Again, I think in November, 1983, we had more than seventy different contests involving I believe the figure was around a hundred and thirty-three candidates.

I also coordinate with those—[587] we would offer to those hundred and thirty-three, a chance to write a guest column for the newspaper—I coordinated that effort. Also, just anything else.

As I said before, try to maintain an open door, because often candidates would either call or come in or ask to meet, sometimes to talk about issues in their particular race or simply to ask about matters of press relations, how they should handle this or that, that type of thing.

Q. Mr. Blount, now turn to late September, 1983. September 22, 1983, Billy Joe New resigned. What effect did this have, to your observation, on the campaign?

MR. LLOYD: Your Honor, may I be heard on that? At Side Bar:

MR. LLOYD: I am going to object to that question. He can ask this witness about this article, but these far-ranging questions about the campaign—

THE COURT: Come on, Mr. Lloyd. This is background. It puts this thing in its proper context. You were given the widest latitude you sought for four days. You've presented your case. It's their turn. I'll going to give them equal latitude. Objection overruled.

Before the Jury:

THE COURT: Objection overruled.

(Question read back.)

[588] A. As I said before, by Labor Day, it was obvious that this was, in most people's minds, the most interesting campaign. When Billy New resigned, that erased any doubt as to whether this was going to be the focal point in the election. Up to this time in Hamilton and the City Council race there had been some issues that looked like they were going to be ones that people would hold on to and talk about socially and so forth. But I think once Billy New resigned, there was no question that the Municipal Court race became the key. Also, at this time, it seemed that there was some change in the cam-

paign focusing away from handling the cases in the court, particularly drunk driving cases, and more on the administration of the court and what should be or what was the judge's knowledge or role, if any, in relation to Billy New.

Q. Did the Journal News cover the resignation of Billy New?

A. Yes, uh-huh.

Q. In what way?

A. We had the break on the story. It was announced that morning, the twenty-second by Judge Dolan. I believe he came in the office somewhere in the vicinity of ten o'clock or 10:30. I'm not sure of the time. We had the story in that day's edition.

Q. The jury has heard that on September 27, 1983, [589] Mr. Connaughton filed what has been referred to as a private criminal complaint, a letter to the Safety Director, Jeff Landrith.

A. Correct.

Q. I believe the jury has even seen that letter.

MR. LLOYD: Your Honor, may I be heard?

At Side Bar:

MR. LLOYD: Your Honor, I do object.

THE COURT: I agree.

MR. LLOYD: Characterizing what the jury has heard.

THE COURT: Objection sustained. You can't do that. You characterized something and it may or may not be. I've never heard that phrase before in connection with this case. A private criminal complaint. I don't know what that means. I'm not willing that the door be opened to a brand new issue in this case.

MR. CREIGHTON: I'm sorry.

THE COURT: All you got to do is object.

MR. LLOYD: Beyond that, I think it's improper for him to premise a question to this witness where this jury has been told or Mr. Lloyd asked or what—characterized the prior testimony.

THE COURT: I can't deal with that in the abstract. I will sustain this objection.

[590] Before the Jury:

THE COURT: Objection will be sustained. Jury is instructed to disregard the question in its form. You may ask the question in another form.

By Mr. Creighton:

Q. Mr. Deputy Clerk, would you please bring to the easel for the jury's view Defendant's Exhibit C, one of the large ones? Would you hand the witness the exhibit book?

Sir, I've had the Deputy Clerk hand you an exhibit labeled C, Defendant's Exhibit C. Would you tell the jury what that is?

A. This is the letter or the complaint, written complaint, that Mr. Connaughton filed with Jeff Landrith, who was then the Director Public Safety for the City of Hamilton, dated September 27, 1983.

Q. Did the Journal News know about that letter, sir?

A. Yes.

Q. When did it find out?

A. I believe that very day, because we had been in contact with Mr. Landrith on this matter for probably two or three weeks as to whether anything would be filed.

Q. Did the Journal News cover that?

A. Yes.

Q. What effect, if any, did you observe it to have on the campaign?

[591] A. Well, again, it brought even into sharper focus the question of the conduct of the court and particularly this race for the court. Again, it overwhelmed all the other election issues and races at this time. It was one of those things that some people said would come and some said wouldn't, so it was a major news story when it happened.

Q. Billy Joe New was arrested shortly thereafter, is that correct?

A. Yes, I believe on the third of October, as I recall.

Q. What effect, if any, did you observe Billy Joe New's arrest to have on the campaign?

A. Again, even more intensity, more interest among the population on this particular race, because of the questions, not only what had happened, but again, questions that were raised by this sequence of events.

Q. What effect did this arrest have on the issues in the political race?

A. I think at this time the question again of the handling of DUI's, which seemed to be the major focus during most of the summer, subsided and it was again on the judge, how much was the judge supposed to know or did he know about the operations? Particularly about the things that at this time were charged against Billy New. It changed again, the focus from what the judge did on the bench to more of what [592] the judge was doing off the bench.

Q. Did Mr. Connaughton seek to take advantage of the problem with Billy Joe New in his political advertising?

A. To my recollection, he did. I think that's when his advertising changed again to emphasize the judge's conduct.

Q. Would you look at Defendant's Exhibit A in that book, sir?

Would you read that portion of Mr. Connaughton's political ad that bears upon the issue of Billy Joe New, in your opinion?

A. There are three paragraphs here. The second paragraph says, "A judge bears ultimate responsibility for the operation and administration of his court. Any failure to manage the court or its employees must be attributed to the judge."

Q. Sir, just for purposes of identification, this political ad, Exhibit A, Defendant's Exhibit A, was it published in the Journal News?

A. Yes, it was. I don't recall the date but I recognize it.

. . . .

[594] Mr. Blount, would you turn to Exhibit D in the booklet?

Would you tell the jury what the Defendant's Exhibit D is?

A. This is the copy of the original letter to the editor that was submitted by Mr. Connaughton to the Journal News.

Q. Was it published?

A. Yes, it was. I believe it was published on the twentieth of October and I note that it was typed on the nineteenth.

Q. What effect, if any, did you observe Mr. Connaughton's letter to have on the campaign?

A. Number one, it got wide readership. I can tell you that. Because it was discussed widely and, of course, again, depending on the reader, it got varied reaction. Among many, it raised some questions. It probably brought to the fore, the question of when did Mr. Connaughton know about Billy New and how did he obtain that information and also got into the matter of whether it was part of a dirty politics thing, whether it was going to be a late hit. Those were things that were being discussed at the time and, of course, the letter just caused that conversation to become even more widespread.

[595] Q. Mr. Deputy Clerk, would you now bring to the easel Exhibit E?

Mr. Blount, would you take Exhibit E in hand, please? Mr. Blount, what is Exhibit E?

A. This is a copy of the letter to the editor as it was published in the Journal News from Judge Dolan, which was replying to the Connaughton letter. It was published I believe on the twenty-sixth of October.

Q. What effect, if any, did this letter have, to your observation, on the campaign?

A. Again, it raised the question of who was guilty, if anyone, of dirty politics or late hits, the timing of charges, all of these things. Again, this became again the

focus at the end of the campaign, more so than any of the other issues, is when did Dan Connaughton know and also, did Judge Dolan know of anything, so on and so forth.

. . . .

[599] Q. Did the Journal News check public records?

A. To my knowledge, we did. We tried to check back to see if the chain of events were there and also her background, things of that type.

Q. What do you mean, her background?

A. She had told us—

Q. "She" is Alice Thompson?

A. Alice Thompson, that she had been in Municipal Court twice. And someone, I don't know who, someone checked that information.

Q. When you say, "had been in Municipal Court," what do you mean?

A. That she had been arrested and been before the court on two matters, one shoplifting and one an assault case.

Q. During the interview, did Alice Thompson [600] volunteer this information?

A. Yes.

Q. It checked out?

A. Yes.

Q. You mentioned that you checked with John Holcomb, the prosecutor. What did you ask of John Holcomb?

A. Specifically, I asked him about her credibility, whether he had any reason to suspect her credibility. As I recall, his comment to me was that she—again, I'm putting this in the context of twenty-five persons who had been subpoenaed for the Grand Jury in the Billy Joe New case—his words something to the effect that she's probably the most credible of the lot or something to that effect. He also said that at the time that her statements as far as the police were concerned had been checked out.

. . . .

[605] Q. Mr. Blount, did you listen to the tapes that Mr. Connaughton offered to you after that meeting?

A. No.

Q. Why?

A. Because by that time, we had had information what the tapes were about. We had the same story basically from at least two of the parties, Alice Thompson and Dan Connaughton, and the police officers and others and the [606] tapes, those topics that we were exploring were not on the tape, I had been told by several parties.

Q. Physically, describe where those tapes were turned over to you, the scene, when they were turned over to you.

A. They weren't turned over to me. It was outside of Bob Walker's office. It was after this interview.

Q. It's not on the tapes, is it, sir?

A. No, it's not. They were turned over I think to someone else.

Q. Were you present?

A. Yes.

Q. Did Mr. Connaughton say anything when he handed the tapes over?

A. There was some discussion between Mr. Connaughton and Mr. Berry as to whether the tapes should be turned over and Mr. Connaughton said that he had promised they would be turned over and I think that's basically the thrust of the conversation.

Q. Did he say anything else about the information on the tapes?

A. About the information on the tapes? Just what he had told us before, that it was basically about Billy New, not about the other things. Also, that's when I think the time when he offered to have someone contact us, basically, [607] Patty Stephens, help us get in touch and have her contact us.

Q. Patty Stephens. As the weekend between Alice's interview and Mr. Connaughton's interview on the thirty-

first unfolded, were you aware of any intention on the part of the Journal News to interview Patty Stephens?

A. Over the weekend?

Q. Yes, sir.

A. Not over the weekend no.

Q. Was there any intention at any time for the Journal News to interview Patty Stephens?

A. She was on the list. It was my understanding at the time that we were trying to get in touch with her.

Q. Now, you testified in response to some questions from Mr. Lloyd at the beginning of the trial concerning the issue of whether Pam Long actually did contact Patty Stephens. I believe it had something to do with a telephone conversation. Would you tell the jury your recollection of that event?

A. After Mr. Connaughton and Mr. Berry had left the Journal News, I had walked back down to the first floor to my office for a minute and then walked back up and was standing beside Pam Long's desk. She was on the phone. I either asked or someone volunteered that—I asked who she was talking to or when she would be available.

[608] Q. Did you ask Pam Long that?

A. No.

Q. Someone else?

A. Someone, there were several other people in the newsroom at that time. I was told by someone that she was talking to Patty Stephens.

Q. But you didn't overhear the conversation, did you?

A. No. I overheard her talking on the phone, but I didn't overhear her talking to Patty.

Q. Did you later find out that your impression was in error?

A. Yes.

Q. It came about really several days later when I was trying to, just in the normal course of things—I'm not exactly sure how it came up exactly, but it was probably

at least a week that later that I realized that that was not the time—at that time she was not talking to her.

* * *

[612] Q. Mr. Blount, I'm sorry. We have been over that. I don't want to go over that again. I'm saying just from Mr. Connaughton's interview on the editing process.

A. From the afternoon of the thirty-first?

Q. Yes.

A. Again, a draft was prepared by Pam Long which was available early in the morning of Tuesday, the first. I'm not sure of the time. But even the night before I had talked to Mr. Irwin, our attorney, told him that we would have a story and have it to be reviewed in the morning. Mr. Irwin had been contacted previously. In fact, we had been talking on various election matters for several weeks. He was advised that we would probably have a story.

Mrs. Long called me after she had interviewed the Barnes and I called Mr. Irwin. So the first thing in the morning was for a review of information she had and the information from the other reporters, some of which I had already heard on the afternoon of the thirty-first. We basically reviewed the information we had, some of the notes and statements were taken from the other reporters, summarizing their interviews and then that draft was reviewed [613] in the terminal or word processor. I guess would be the best way to describe it.

Q. Would you, just for a second, just tell the jury what you mean by that, so they understand how an article goes into the newspaper?

A. As with most operations in recent years, there's less and less paper and more of it committed to computer. In our case, it's a computer which functions as a word processor, and then when the story is finally edited, to position through a command it goes from a word processor to a typesetter. So stories are usually edited and

added to and reworked and so forth in the word processor, within the terminal. Several people can look at the same story at the same time. I know this statement was checked; I checked it, Bob Walker checked it.

There was some discussion about it, over a period of maybe an hour or so. Then Mr. Irwin was called over to review what we had at that point. That's when we also met with Mr. Cocozzo, the publisher, so that the four of us could talk about it. That four would have been, besides myself, would be Mr. Walker, Mr. Irwin, Mr. Cocozzo.

Q. When it came time to make a decision, as to whether to publish this article, did you recommend that it be published?

A. Yes.

[614] Q. Would you tell the jury why?

A. Basically, it was a newsworthy story. It answered a lot of questions that had been prevalent in the community. As I said before, among those, how Dan learned, when he learned, who some of the people were. Some of the other circumstances behind his filing charges. It addressed in some way the charge that had been made against him that this was a late hit, late charge that he was holding back information. So it answered a lot of those questions that had become very paramount in this campaign.

Q. Did you feel that the story as published was balanced, and would you first explain what balanced means from a journalist's particular standpoint?

A. Balance means, and this is of course one of the things we set out to do, was to give all the parties that we could possibly include a chance to react and respond to what was being said here. Of course, I think very high in the story is the Mr. Connaughton's denial and denial of others. So I considered it not only balanced, but I think we approached it with that in mind. Let's lay it out. Let's put it out here for the reader to see and basically, I went from there.

Q. Did the legal review given by Mr. James Irwin have any impact upon your recommendation that it be published?

[615] A. I had reached my conclusion before and, of course, the way we usually proceed, we read such a story independently so that when we get together, we are not basing our decision one on another. So I had reached a decision on newsworthiness, what we had, before the conference with Mr. Irwin.

Q. Sir, did Mr. Connaughton hold a press conference after the publication of this article, to your knowledge?

A. Yes.

Q. Was that on November third?

A. Yes, Thursday, November third.

Q. Did the Journal News send the representative?

A. Yes, I believe the reporter who wrote the story was Jeanne Houck and I think someone else went with her. At this point I'm not sure if it was Mrs. Long or someone else.

Q. Did the Journal News cover it?

A. We ran a story the next day, Friday, fourth of November.

* * *

[619] Q. Turning back to where we broke for lunch, Mr. Blount, I had asked you whether or not the Journal News had covered the press conference that Mr. Connaughton had held on November 3, 1983 and you said you believe you didn't, and I was going to have you take in hand Defendant's Exhibit F. Would you identify that, please?

Q. Excuse me. Defendant's Exhibit F?

A. Story that ran Friday, November 4?

Q. What is it? I want you to identify it?

A. It's a story that was written by Jeanne Houck, one of our reporters. It was written based on Mr. Connaughton's comments at his press conference called at his home on, would have been Thursday, November third. This was the story that appeared. There was also a photograph of Mr. Connaughton taken at that time, too.

Q. Who was that covered by?

A. Jeanne Houck was the reporter. There was another reporter. I'm not sure. I think it was Mrs. Long. I'm not sure if it was. Also, if I may look here, the photograph was by Jim Denny, the photographer at the scene.

MR. CREIGHTON: Your Honor, may I turn it towards the witness to make sure that that is—I want him to identify that being the one he's describing.

THE COURT: Feel free.

Q. I'm turning this toward you for a second. Is [620] that Exhibit F?

A. Yes, that's the form in which it was published.

Q. By looking at this blown-up exhibit of Exhibit F that's in the exhibit book, does that tell you where in the newspaper this article appeared?

A. Yes, I believe there's, again, I believe there is a B over to the right.

Q. Let me turn it again.

A. Yes, the B on the right indicates that that's—plus the index indicates that that's the first page of the second section of the paper, basically, where we display the more current, more relevant local news of that day.

Q. In terms of the word "play," the Journal, I guess the particular word "play," is that a particular place in the newspaper where it has good play?

A. Yes, very much so.

Q. Would you turn to Defendant's Exhibit G? Mr. Deputy Clerk, if you would like to remove that, please. Would you identify Defendant's Exhibit G for the jury, please?

A. Yes, it's a story also published on Friday, November fourth, on page one. It is the report of the Grand Jury findings in the Billy Joe New case. It was written by Pam Long.

Q. Where was that story placed?

[621] A. My recollection, top of the page, across the top of the page, page one.

Q. Sir, I'm going to hold up what I believe to be the, in your opinion, the edition in which that was published so that the jury can see and ask you, is this to your recollection, a copy of the actual newspaper that was published?

A. Yes.

Q. Is that the article that is described or that is Exhibit G, a copy of it?

A. Yes, it is.

Q. In terms of play, sir, is this the number one position in a newspaper for an article to play, that is, the prime position?

A. That is the prime position, above the fold, top of the page.

Q. Similarly, Mr. Blount, from the same date, is this the way that the Exhibit F played in the newspaper?

A. Yes.

[625] Q. Let me interrupt you. So the record is clear, that is the story, Exhibit G, sir?

A. Correct.

Q. Headline, "Grand Jury Indicts Billy New"?

A. Yes.

Q. Would you point out for the jury that portion of the article that concerns the information that you were just addressing?

A. In the second column as it appears in the booklet here, there is a paragraph that says, "Holcomb also issued a statement when the Grand Jury returned its indictments."

Q. Who is Holcomb?

A. Holcomb is the Butler County prosecutor.

Q. Go ahead.

A. This is a quote from that statement, "Other than what is included in the Grand Jury report, it is only fair to point out that, in the opinion of the prosecuting attorney, [626] the evidence before the Grand Jury failed to implicate anyone in the Hamilton Municipal Court in any illegality, including Judge James Dolan,

nor did the evidence indicate any illegality of Hamilton Municipal Court Judge Candidate Daniel Connaughton in the possible inducement of a candidate to give testimony, Holcomb's statement said in part."

* * * *

[639] Q. I'm not going to argue with you about who said what, but I do want to ask you this. When you wrote this article, was it your notion or point of view that it was perfectly proper to print what Miss Thompson said about Mr. Connaughton, so long as you included in the article denials from him and other people?

A. I don't think that's exactly—

MR. CREIGHTON: Objection.

THE COURT: Overruled.

A. I don't think that's exactly the way I described it. As I said before, we did some checking on Miss Thompson, because we did not know her. We tried to verify through several sources whether we had what we could call a credible [640] person on these points.

Q. You talked to Mr. Holcomb. You didn't ask him whether he believed Mr. Connaughton or Miss Thompson about something on which they disagreed, did you?

A. No, because we hadn't talked to Mr. Connaughton at that time.

Q. Do you remember Mr. Connaughton telling you that he had information that Miss Thompson had been in Hughes?

A. Yes.

Q. Do you know what Hughes is?

A. Well, I think when he was challenged on that that he said he had not verified it. I believe that was on the tape this morning. He mentioned it early in the interview and I think we came back to that question and I don't think we got a definitive answer on that.

Q. Did you ever check?

A. No, because psychiatric and medical records are not public record.

Q. Would you be concerned with the credibility [of] somebody that you were told had had a history of psychiatric illness?

A. We would certainly listen to that information.

* * * * *

[TESTIMONY OF PAMELA LONG]

* * * * *

[123] Q. And the plan was that various reporters for the Journal News would interview the various people who were present at Connaughton's house on the night of September 17th, isn't that right?

A. That was one of three meetings and two phone calls that Alice had told us about that we were trying to verify.

Q. But my question was, the people that were at that meeting that were to be interviewed simultaneously, is that right?

A. No, because we knew that we wouldn't be able to talk to the Barnes until later that evening on the 31st.

Q. Well, with the exception, but—

THE COURT: Mr. Lloyd, please let the witness finish her statement. Finish your answer.

A. I think I am finished now.

THE COURT: Proceed to your next question.

Q. Now, but the one person who was present at that meeting who was not on the list to be interviewed was Patsy Stephens, is that right?

A. Yes.

Q. Now, would I be correct that no one from the Journal News made any attempt to contact Patsy Stephens prior to the publication of the article on November the 1st, 1983?

[124] A. Of my knowledge, I know of no one. But if I could explain.

Q. Let's just—

THE COURT: You may explain it.

A. Thank you, Judge.

Q. She said no. Okay, that's okay. Say what you want.

A. When we finished our interview with Dan and also after we talked to Alice, we had been told that Patsy was going to be rather difficult to get in touch with. Dan had volunteered to help get Patty in touch with us and so based on that representation we assumed that Patty would get in touch with us and there have been times in the past when other people have said to us on other stories that I have worked on that I'll have somebody get in touch with you and they do.

Q. Well, she didn't get in touch with you and you didn't try to get in touch with her, right?

A. No, I did not try to get in touch with her.

Q. So you heard Mr. Blount testify that he was present at your desk on the 31st when you tried to get in touch with her. He is in error about that, is that right?

A. I did not talk to her on the 31st.

Q. And did you think that it was important to talk to her before the story was published?

A. After we had already been given the information [125] from Dan that he verified the meetings and also verified the phone calls and also that the words "jobs" and "trips" had been used, Patsy Stephens did not become as important because we had gotten from the principal source, Dan, and also his wife, Martha Connaughton.

Q. Both Dan and Martha deny that any offers or promises of jobs or trips were made, didn't they?

A. They denied any specifics. But then Mr. Connaughton came back during our interview with him and said, "Well, I understand those words had come up and I can understand how they would say that." And he gave us the impression that the words were never to say it—he never said the words were not spoken. The words were spoken, but he claims they misunderstood and we wrote that in the article. We wrote his denial and also the fact that the words were that they misunderstood.

Q. May I have the question read back? I've forgotten my question.

THE COURT: Read the question, please.

(Whereupon, the pending question was read by the court reporter.)

A. My answer is no, with that qualification, yes.

* * *

[127] A. When I wrote the article, I believed that it was true.

Q. Do you believe it now?

A. Yes, sir.

Q. Would you please hand this witness a copy of her deposition? Do you have it?

A. I have one, thank you.

Q. Would you turn to page 47, please. Now, you remember that the deposition was taken July 2nd, 1984, at our offices in Cincinnati?

A. Yes, sir.

Q. Do you remember you were present represented by counsel?

A. Yes, sir.

Q. And you were under oath?

A. Yes, sir.

Q. Would you look at the bottom of page 47, please?

A. Yes.

Q. Do you see the question—did I ask you this question, "You regarded her statements about Dan Connaughton offering trips and jobs as probably true, more likely true than false?" And then your lawyer said—I will not read all of it. "Again, for clarification, are we talking about the statements of Patsy Stephens, the facts she states or the claims she's making in regard to her interrogation of those facts?" And is [128] that right, you see that there as the top of page 48?

A. Yes.

Q. And I said, did I not, "Well, I want this witness to know that the only statements of Alice Thompson about which you were interrogating her are the state-

ments that Dan Connaughton made promises of jobs and trips." And I said, "The rest of it is not my ballgame. I'm not interrogating her about that, the aspects of Alice Thompson," and Mr. Irwin, who was your lawyer said, "Her claims." And then I say, "Her claims, did you regard those as more likely true than false?" Do you remember that question?

A. Yes.

Q. And then did you say, "I didn't make a decision on that"?

A. Yes, that's what it says here in the deposition.

Q. Right. In other words, you had not made any decision whether Alice Thompson's claims about Dan Connaughton's offering trips and jobs were true or false when you wrote the article?

A. I think you asked me if I believed her and I do believe her.

Q. Well, let's continue. Your answer, "I didn't make a decision on that." Then I asked you, "Do you make a determination as to your belief about the probable truth or falsity of statements when you prepare an article?" And your [129] answer was, "I verify the facts." Right?

A. Yes, sir.

Q. Then I asked you, "Well, at the time you prepared this article, you had not made an assessment that this is a probable truth or falsity of Alice Thompson's claims that Dan Connaughton offered her and her sister trips and jobs?" And then you said, "Wait, go through that again." Right?

A. Uh-huh.

Q. And I said, "Read it." And the reporter read the question. Then your answer was, "I had verified the facts." Then I said, "Just answer that yes or no." And you said, "But to answer yes or no isn't fair." And I said, "I have a right to get the answer. You can elaborate on it, but you have to answer it yes or no first."

Then Mr. Irwin said, "If you can." And you said, "I don't think I can." Right?

A. That's what it says here, yes.

Q. And what you meant was that you can't answer the question you had made an assessment of the probable truth or falsity of Alice Thompson's claims that Dan Connaughton offered her and her sister trips and jobs, isn't that what you said?

A. I said, when I did my deposition, that I verified the facts of what Dan had said. And I think verifying the facts is much different than, you know, saying I believed her. I verified what she had said and I found that the statements that she had made to us about meetings and about [130] phone calls were true based on her interviews with her and other people who were there. At the time that I wrote the article I know I believed that she felt that she was—that what she had said had been verified.

Q. Yet you believe that she believed, but that's not the same thing as saying you believed that Dan Connaughton said it, is it?

A. I'm sorry. I'm confused.

Q. Saying you believed she said it, she believed it, is not the same thing as saying you believe that Dan Connaughton said it, is it?

A. Mr. Lloyd, would you break that question down?

THE COURT: Mr. Lloyd, I think you made your point. Would you pass onto something else.

* * *

[555] Q. In other words, before you made that tape, you had a pretaping discussion with Alice Thompson, is that right?

A. We had about five minutes at the most. Just "Hello, I'm Pam Long, this is Jim Blount, this is Mr. Cocozzo", and that's all.

* * *

[572] THE COURT: Any questions from the jury? There's a question.

Miss Long, would you know who wrote the headline for that article?

THE WITNESS: No, I don't.

THE COURT: Who usually writes the headlines?

THE WITNESS: The editors.

THE COURT: Do reporters not write the headlines?

THE WITNESS: Right, reporters don't write headlines.

* * *

[775] Q. Miss Long, when last you were on the stand, I neglected to ask you a couple of questions. Let me direct your attention, please, to your preparation of the article that's the subject of this lawsuit, and your efforts to [776] verify some of the statements by Alice Thompson.

Were you ever able, prior to the publication of the article, to talk to Patsy Stephens?

A. No, I was not. As I said.

Q. If you would just explain to the jury, as briefly as you can, what your efforts were to contact her and why you were unable to contact her before the article.

A. We had been told by Dan Connaughton that he was going to get Patsy Stephens in touch with us and we relied on his saying that, that she would come to us, and so we were waiting for her to come to us at any time, until the article went to print.

Q. There was, I believe, some testimony regarding a meeting that had been set up with Patsy Stephens that you cancelled. Can you tell the jury about that meeting? When it was?

A. This was to be after the publication of the article. We were still open to having Patsy Stephens come in and talk to us. To continue with the story, a story is not ever completed, you know, there's always follow-up stories to it. We were open to that. On Thursday, November third, Patsy Stephens—I had been told through

my editors that Patty Stephens was going to come up sometime between eleven and one and talk to us. So I cleared my schedule so that I would be able to do that. I waited then through the rest of [777] the afternoon, because I thought perhaps she's just late or couldn't make it or whatever.

About ten 'til three in the afternoon on November third, I got a phone call from Patsy Stephens saying that, you know, "Hi, I'm Patsy. I want to talk to you." I told her, "Patsy, this appointment was supposed to be from eleven to one. My daughter's school just called and said that she was sick with pink eye," which is conjunctivitis, and highly contagious in a school setting. She's six years old, in first grade, so I said, you know, "Patty, I can't talk to you right now. It's ten 'til three, I have to go pick up my daughter at school."

She also said she had children and had to do after-school things with her children. I offered to interview her that night and Patsy said no, she didn't want to give me her phone number. I said, "Well, you know, we could meet." She didn't want to do that. She didn't want to meet face-to-face. She wanted to talk over the phone. I thought that was kind of unusual because the other interviews had been face-to-face and they had been taped.

Patsy then said, you know, she would call me the next day. Sometime. Then I said okay, fine. So I waited all next day and in that time, I listened to the tapes, because the Grand Jury had met that morning.

* * * * *

[TESTIMONY OF PATSY STEPHENS]

* * * * *

[153] Q. How long did it all last, if you recall?

A. Gee, I guess we were there for about five hours.

Q. Now at any time during that whole discussion, did Mr. Connaughton make any promises of any kind—just wait until I finish the question would you please—make any promises of any kind either to you or to your sister,

Alice? Specifically, did he promise either one of you to take you on a trip to Florida?

A. No, sir.

Q. Did he promise to give either one of you a job?

A. No, sir.

Q. Did he promise to operate a restaurant where you or Alice could work?

A. No, sir.

Q. Did he promise to set up a restaurant which your mother and father could operate?

A. No, sir.

Q. Did Mrs. Connaughton make any promises of any kind to either one of you?

A. No. Me and Mrs. Connaughton and Alice, we discussed my having a small restaurant and she said that that's something she's always thought about doing, is opening up her a small ice cream parlor of some kind and she said, "Maybe you girls could give me a few tips to how to take and get a [154] business going, as far as what to serve and etc., etc." But as far as a promise of a job, no.

Q. Now, I'll ask you again, if at any time during that entire discussion that either Mr. or Mrs. Connaughton promised or offered you or your sister anything?

A. No, sir.

* * * * *

[178] Q. You told the same story to the Grand Jury though, didn't you?

A. Yes, I did.

MR. LLOYD: Objection as to what she said to the Grand Jury. I think that's protected.

THE COURT: Overruled. Question and answer may stand.

Q. Yet, it's true, isn't it, that the Grand Jury completely cleared Judge Dolan?

A. It looks that way, don't it?

Q. The prosecutor issued a public statement clearing Judge Dolan of any wrongdoing, did he not?

A. Did he what?

Q. He issued a public statement clearing Judge Dolan of any wrong, didn't he?

A. I guess he did.

* * *

[183] Q. Did Mr. Connaughton appear disappointed to you the day Mr. New resigned?

A. Not really disappointed, not at all. I guess he felt. I can't say how he felt.

Q. Did he appear to you to be upset?

A. He was upset on the perspective that, you know, here is something that we are trying to get proof on, or rather, we have proof, and before you can take and go to this person to find out if it's the truth or not, this person resigns. It makes you wonder, who is corrupt and who isn't.

* * *

[702] Q. Let me try my question again, Mr. Connaughton. In fact, no one associated with the defendant in any way has offered you one cent to settle this case, is that correct?

A. That's correct.

MR. IRWIN: Your Honor, may we approach?

THE COURT: You may.

At Side Bar:

MR. IRWIN: At this time, Your Honor, the defendant would ask for a short recess to allow a brief in chambers discussion with the court.

THE COURT: Come ahead. No problem.

Before the Jury:

THE COURT: Ladies and gentlemen, a matter has arisen that must be considered in your absence. Accordingly, we will take a brief recess. I suspect of the order of ten minutes.

(Jury excused at 9:15 a.m.)

In Chambers:

MR. IRWIN: Your Honor, we were faced with some very difficult choices last night when we were [703] approached by Miss Stephens and she came forward and Mr. Creighton and I did not meet with her because we did not want to make ourselves witnesses in the case. Mr. Jim Irwin, who as acted as the general counsel for the Journal News for years and he was trial counsel, until Mr. Lloyd had asked that he be disqualified, did meet with her along with the publisher of the Journal News, Mr. Joseph Cocozzo, which the information which I've laid a foundation for in my questions to Mr. Connaughton was elicited from Miss Stephens and we are prepared to call her now—

THE COURT: Go ahead.

MR. IRWIN: —to impeach Mr. Connaughton. We thought, after discussing this among ourselves, and it was the wish of our client that we give some forewarning to exactly what we were going to be doing in open court in the event Mr. Connaughton wanted to in any way reconsider going forward with the case. We didn't know how to approach the subject. We thought this would be perhaps the only way to do it, under our obligations to our client and to the Court.

THE COURT: I see no problem here.

MR. LLOYD: We don't know any more about this than we just heard, you know. I suppose we should have a second to discuss it with Mr. Connaughton.

THE COURT: Feel free. Your client, as an experienced lawyer, knows that these questions didn't come [704] out of the blue, that there's got to be a reason for those questions and it's his move, that's all. If you want some time to talk to him, feel free.

MR. LLOYD: Well, just a minute. I just want to advise him of what we have heard.

THE COURT: I have no problem with it. We'll wait 'til 9:30 and go back in then or whenever you tell me you are ready to go.

MR. LLOYD: We would like to have an opportunity to visit with Miss Stephens.

THE COURT: No, I'm not going to—you will have an opportunity to cross-examine her, but I'm going to let them present her at this time, as soon as we get back in here and her testimony is whatever it is.

MR. LLOYD: That's all right. They haven't got her in protective custody. She isn't anybody's witness. I would like to have an opportunity to just chat with her before she takes the stand.

THE COURT: I don't think so. I think under these circumstances, Mr. Irwin could have excused your client and immediately called her and he would have been within his rights to do so.

I don't know where we are going on this, but I think they are entitled to present their next witness without any previous consultation. Let's simply adjourn and you tell [705] me when you are ready to go back in.

(Conference concluded.)

Before the Jury:

THE COURT: Mr. Irwin, you may proceed. Do you have further questions of the witness?

MR. IRWIN: No, Your Honor, we do not.

THE COURT: Mr. Lloyd, do you wish to conduct any interrogation at this time?

MR. LLOYD: No, I do not, Your Honor.

THE COURT: You may call your next witness.

MR. IRWIN: At this time the defendant calls Patsy Stephens to the stand.

(Witness previously sworn.)

DIRECT EXAMINATION

By Mr. Irwin:

Q. For the record, would you please state your name?

A. Patsy Stephens.

Q. You are going to have to speak into the microphone.

A. Patsy Stephens.

Q. Thank you. I would like to ask you some questions about the days before and the day of your testimony in this case last week. Do you recall that that was last Tuesday?

A. Yes, I do.

[706] Q. Do you recall meeting with Mr. Connaughton and his attorneys the night before you testified?

A. Yes, I do.

Q. Do you recall going to a restaurant that night with Mr. Connaughton and his wife?

A. Yes, I do.

Q. Do you recall being driven down here on Tuesday to testify by Mr. Connaughton?

A. Yes, I do.

Q. Can you tell me what was discussed in your drive down here on Tuesday morning, between you and Mr. Connaughton? Please tell me what you said and what Mr. Connaughton said.

A. I asked Mr. Connaughton if he intended on moving when this was all over with and he said he was thinking seriously about moving. I said, I continued saying, I said, "But Dan," I said, "I've been told by several people that I should have asked for ten percent of whatever you got," and I said—he says, "Well, I know you are not like that." I said, "No, I have to live with myself." He said that he intended on taking care of all his friends that stood by him through this. Making it worth their while. In other words, my aggravation and everything through this.

Q. Those were his words?

A. Uh-huh.

[707] Q. In the month or so preceding this trial did you have any conversations with Mr. Connaughton regarding any offers of settlement by the defendant in this case?

A. Yes, I talked to Dan and he said that the Journal News had offered him a lump sum of money and no apology and he wanted to see this thing through because he felt like they owed him an apology.

Q. Do you recall what that sum of money was?

A. Something like three million dollars.

MR. IRWIN: Your Honor, I have no further questions of this witness at this time. We reserve the right to recall her if need be in our case.

THE COURT: You may. Mr. Lloyd, do you wish to interrogate?

CROSS-EXAMINATION

By Mr. Lloyd:

Q. Miss Stephens, do you remember calling, placing a call to me at my office last Wednesday?

A. Yes, I do.

Q. You had testified last Tuesday, that is right?

A. Yes, I did.

Q. Then after you testified, there was an article in the Hamilton Journal News which there was some headline or something that Stephens said sister lied?

A. Uh-huh.

[708] Q. Is that right?

A. Yes, it is.

Q. You called me late in the afternoon of last Wednesday, did you not?

A. I sure did.

Q. You talked to me and I put Miss Lux on the phone and you also talked to her, isn't that right?

A. Yes, I did.

Q. Did you not say at that time that, excuse me, a minute, Your Honor—

THE COURT: Take your time.

Q. Did you not tell us that your sister, Alice and your mother told you that they were going down to the Journal News and meet with the people down there and their attorneys and tell them a lie, that Mr. Connaughton and

I entered into a written agreement to give you ten percent of what was recovered in this case?

A. When I called—

THE COURT: Wait, wait, an objection. If you will forgive me for just a moment, let me sort this out. You've got hearsay on hearsay, Mr. Lloyd.

MR. LLOYD: It's impeachment. It's what she told me.

THE COURT: May I see counsel, please?

At Side Bar:

[709] (Question read back.)

MR. LLOYD: That's what I heard.

THE COURT: I think you've got to do this differently. I think that question is improper. I think that is asking for second degree hearsay.

I think you may ask this witness what she told you regarding her mother and sister and I'll let her testify as to that. But I don't think you can have this question answered in this fashion and I will allow you or Miss Lux or both to testify in this matter if this does become pertinent.

MR. LLOYD: I'm going to have to have Miss Lux testify because I represent to the Court that when I realized what it was, and I had other things to do, I said, "Here, talk to Sally. She knows more about it than I do."

THE COURT: We have enough difficulty in this case. I'm not going to hang up on the question of whether counsel may testify. I'm going to permit it. I will sustain the objection as to form of this question.

Before the Jury:

THE COURT: Members of the jury, I'm sustaining the objection as to form and I direct you to disregard that question.

By Mr. Lloyd:

Q. Do you remember what you told me?

A. Yes, I do.

[710] Q. What did you tell me?

A. I called you and I told you, I said, "Mr. Lloyd," I said, "Alice and Mom has gone to meet with the Journal News' attorneys right now." My sister told me that they were going up to take and say that I stated that I had a legal document drawn up and notarized between Dan, yourself and I; I asked for ten percent. If I didn't get ten percent, that I was going to take and come in and go along with Alice's story.

MR. LLOYD: May I have a minute?

THE COURT: Take your time.

Q. Well, what Alice was going to say was a lie, wasn't it?

A. I took and—it was on a Friday—I had been trying to get along with Alice and that and I told Alice, I said, "Alice," I said, "I really don't want to go through with this thing on your behalf. I think we have been through enough," and I really felt like me and Alice has been through enough. I said, "I'll tell you what I'll do." I said, "Everybody has been after me." I said, "Through-out this whole thing that I should take and ask for ten percent if there's going to be any money involved, for my embarrassment and for your embarrassment." I did tell Alice that.

THE COURT: I don't think that's responsive. Read the last question, please.

[711] (Question read back.)

A. No.

Q. Well, you and I and Dan Connaughton never entered into any agreement to give you any part of any money?

A. I didn't discuss it, no. Nothing was discussed. I told Alice—

MR. LLOYD: Excuse me.

THE COURT: First, the court reporter can't take two of you and I'm not sure either the jury or I can understand. Present your next question.

Q. Well, my question, I'm going to have to repeat that question. You and I and Dan Connaughton didn't enter into any agreement to pay you anything, did we?

A. No, sir.

Q. It was never discussed, was it?

A. No, sir. I made the statement to Alice and my mother and myself that that's what I was going to do in order to try and—I don't like having this between me and my sister. I really don't. This was not intended to be like this.

Q. Patty, as I understand this, you came into court last week—

THE COURT: Mr. Lloyd, ask a question. You may not testify. Ask a question.

MR. LLOYD: This is cross-examination.

[712] THE COURT: I understand, but this was your witness originally.

MR. LLOYD: It isn't now.

THE COURT: All I'm saying to you now is you may not testify. Ask a question, if you have a question.

Q. Did you tell the truth when you testified last week?

A. I still feel like—

Q. Just answer that question.

A. Yes.

Q. All right. Now, I take it you are very uncomfortable because you are pitted against your sister in this lawsuit, right?

THE COURT: Objection sustained. Jury is instructed to disregard the form of that question.

MR. LLOYD: It's very important, Your Honor. I must consult.

THE COURT: I can't help it. I'm not going to let you ask a leading question to this witness at this time.

MR. LLOYD: Your Honor, this is the most gut-wrenching impeachment.

THE COURT: May I see counsel, please?
At Side Bar:

THE COURT: I have no problem with impeachment. I have a great problem with you testifying. [713] Read that last question.

(Question read back.)

THE COURT: That's a classically leading question. If you want to ask her how she feels, you may. You may impeach her, but you can't testify.

MR. LLOYD: I believe Rule 611 permits you to impeach a hostile witness with leading questions.

THE COURT: I don't disagree. But I also object to the fact that you are testifying. You ask her a question of how she feels about this.

Before the Jury:

By Mr. Lloyd:

Q. Did Dan Connaughton ever promise you anything for testifying in this case?

A. I didn't take it as a promise, and I don't feel like I was promised anything during the tapes, were never being made or anything like this. I was asked to tell the truth and this is what I'm doing. I didn't take it as a promise, no.

Q. When we met the first time—strike that. Let me start over.

First time you and I met was about a month ago in Dan Connaughton's office, was it not?

A. Yes.

Q. At that time you told me that you had just had [714] been called on by attorneys for the Journal News, is that right?

A. Yes, sir.

Q. And you told me what they said to you, did you not?

A. Yes, sir.

Q. Didn't I ask you questions about a lot of aspects of what had gone on in this matter?

A. Yes, sir.

Q. And I said, "Patty, I want you to just tell the truth," did I not?

A. Yes, sir.

Q. Isn't that what you've done?

A. Yes, I have.

Q. At any time has Dan Connaughton ever promised to give you anything in exchange for your cooperation in this lawsuit?

A. I don't think by telling me that when this is all over with, that—I don't think by saying that he's going to take and give me something out of his heart is a bribe and I don't take it as a bribe or a promise. You can look at things a million different ways. It's how a person feels within.

Q. Did he simply say he appreciated your cooperation?

[715] A. He said he appreciated the honesty in me.

Q. Sure. You were honest when you testified, weren't you?

A. Yes, I was.

Q. And you are honest now?

A. I'm honest now.

Q. Okay, what was your meeting about last night with Mr. Irwin, what was that about?

A. What it was about, I knew that Alice and my mother was coming to court today and I knew what it was going to be mostly about, so I wanted them to know that as far as anything being said all along, it's been looked like everybody thinks that I'm being bought or being promised, and I don't feel like I'm really being bought or promised. If someone says, you know, "I think you've been through a lot. If I get anything, I would like to help you and your family," that's one thing, but if they say, "You have to do this or if you do this, I'm going to do this, I'm going to do that," that's a bribe, that's a promise.

Q. You haven't been bought by anybody?

A. Please?

Q. You haven't been bought by anybody, have you?

A. No, I can't be bought.

Q. Who initiated this conversation last night you had with Mr. Irwin?

[716] A. I did.

Q. Why did you do it; that's what I'm trying to find out.

A. The reason I done it is because I knew when my mother and Alice would come down here today, I didn't want it looking like they were totally lying about the incident as far as any ten percent being brought up or anything. This was my own doing.

Q. In other words, as I understand it now, they told you they were going to come down and testify to something about ten percent.

MR. IRWIN: Objection.

THE COURT: Objection sustained.

Q. What was it they said to you?

MR. IRWIN: Same objection.

THE COURT: I'll allow that. I'll overrule that objection.

Q. What was it they said to you, that caused you to go see Mr. Irwin? That's what I'm trying to get at.

A. I was talking to my other sister and I said "What all do Mom and Alice have to say to the lawyers," like that. Is it about the fact that I told Mom and Alice that I told Alice that I would not take and put her through no more than what she had been through and I didn't want this between her and I. That's when I found out that my mother and Alice were [717] going to be here today. Me or Alice, neither one can be bought by nobody. I don't like the public eye looking at it like this.

When we started it, we didn't start it with no bad intentions or anything like this. I done it hoping there would be corruption stopped in the municipal courts and that's the only reason I done it. To myself, I feel like this thing has been turned completely around in the political, and the whole thing—

THE COURT: I think you are getting off the point. Present your next question, please.

Q. I don't want to lead the witness, but I guess what you are really saying is you're here—

THE COURT: Mr. Lloyd, I'm objecting to your using those words. If you have a question, you present a question.

Q. When you went to see Mr. Irwin, was it your purpose to make peace in the family?

A. Yes.

Q. To make it all seem like you are all saying the same thing?

A. No, not at all. I have a right to feel the way I do, just like anyone else has a right to feel the way they do. I called Alice and I said, "Alice, this is ridiculous."

THE COURT: You've answered the question. Do [718] you have another question?

MR. LLOYD: I think nothing now.

THE COURT: Anything further, Mr. Irwin?

MR. IRWIN: Yes, your Honor.

REDIRECT EXAMINATION

By Mr. Irwin:

Q. Miss Stephens, some of the things that you said in response to Mr. Lloyd's questions prompt me to ask on a few of those topics. Your sister, Alice, has she maintained throughout this whole thing the same belief regarding the statements that were made during the September meeting in the Connaughton's home?

MR. LLOYD: Objection.

THE COURT: Overruled.

MR. LLOYD: Your Honor, I must approach.

At Side Bar:

THE COURT: May I make an observation that you gentlemen are proceeding to make a shambles out of this. I'm not being critical. Maybe it's inherent. But this witness at this particular point is almost incoherent.

Now, Mr. Lloyd, you raised this question. You asked about peace in the family. You've opened that door. I think that the both of you are going to regret if you persist in interrogating this witness. If you want my opinion, I'm sure you don't, she'll say anything you want her to say. I think this lady [719] has some mental problems, but I don't care. All I'm going to try to do is keep this reasonably within the bounds of the evidence.

MR. LLOYD: The basis of my objection he asked her what somebody else believed.

THE COURT: Mr. Lloyd, this door has been opened, because you opened it. You asked about what her reasons for doing this were, and I must confess, I don't quite understand them even yet, but I'm going to allow this question to be asked.

Before the Jury:

THE COURT: - Overruled. Read the last question.

(Question read back.)

A. Yes.

By Mr. Irwin:

Q. You know your sister, don't you?

A. Yes, I do.

Q. Do you believe that she would come into this courtroom and lie on the witness stand?

A. No. She's a strong individual, I feel like, but I take her as a strong individual. When Alice believes in something, she believes in it strongly.

Q. Your mother's name is Zella McQueen. Correct?

A. Yes.

[720] Q. Do you think she would come into this courtroom and lie on the witness stand?

A. I don't want to think of neither one of my family members being liars. I believe she would tell the truth.

Q. Some of your responses to Mr. Lloyd's questions make me want to seek clarification on two points.

MR. LLOYD: Object to that statement by counsel.

THE COURT: May I see counsel, please?

At Side Bar:

THE COURT: Incidentally, Mr. Lloyd, the word "believe" was never in the last question you objected to. What's the objection to this?

MR. LLOYD: He's indicating he doesn't approve of my questions, and some of her responses cause him to ask more questions.

THE COURT: Read the last question.

(Question read back.)

THE COURT: There's nothing wrong with that. That's simply a preliminary statement. He's telling the witness he wants clarification. If he's lucky he might even get it. Let's go forward.

Before the Jury:

THE COURT: If you wish to be heard, it must be in the absence of the jury. Do you wish to make any [721] statement?

THE WITNESS: I just want to ask a question to you.

THE COURT: Ladies and gentlemen, I'm going to excuse you from the courtroom for just a moment.

(Jury excused.)

THE COURT: Miss Stephens, did you wish to make a statement?

THE WITNESS: As my constitutional rights, have I got a right to plead the Fifth Amendment on any question I think might—

THE COURT: If there is a matter that might tend to incriminate you, you have a right to refuse to answer on the basis of the Fifth Amendment.

THE WITNESS: I do have that right?

THE COURT: Of course.

THE WITNESS: Okay.

THE COURT: Return the jury, please.
Before the Jury:

THE COURT: I believe you had a question, Mr. Irwin, that had not been answered. Do you wish to present another question?

MR. IRWIN: Yes, I do, Your Honor.

THE COURT: You may proceed.

By Mr. Irwin:

[722] Q. Miss Stephens, Mr. Lloyd asked you if testimony you gave in this courtroom last Tuesday was the complete truth. Is that still your answer?

A. To the best of my knowledge, yes.

Q. Directing your attention to the meeting on September 17th in the Connaughton home, can you tell me if at that time there was discussion by Mr. Connaughton about playing the tapes, Judge Dolan resigning and your names never being used?

A. I take the Fifth.

MR. LLOYD: I will object.

THE COURT: Mr. Irwin, I think you are limited on redirect to matters brought out by Mr. Lloyd.

MR. IRWIN: Mr. Lloyd did open that door by asking her—

THE COURT: May I see counsel, please?

At Side Bar:

THE COURT: How do you respond out of the presence of the jury to the fact that this appears to be a brand new subject and not raised by him on his interrogation of this witness?

MR. IRWIN: My response is the same, that is, that Mr. Lloyd specifically made a point of getting this witness to confirm her earlier testimony, despite her having contacted the Journal News and it being an apparent, you [723] know, change of heart. He asked her if everything she said was true.

THE COURT: Mr. Lloyd, how do you respond?

MR. LLOYD: First of all, all that subject matter was covered the first time she testified.

THE COURT: No, no, I think Mr. Irwin is right. You did ask her, in effect, to reaffirm her previous statement.

MR. LLOYD: I asked her whether it was all true.

THE COURT: Good enough, he's testing that.

MR. LLOYD: Your Honor believes that the door is open to testify to anything she said on the stand?

THE COURT: I will take this on a question by question basis. If this has a basis, if this bears upon her veracity, which at this point is highly in question.

THE REPORTER: She answered she took the Fifth.

THE COURT: I didn't hear that.

MR. LLOYD: What did she do, take the Fifth?

MR. IRWIN: May I suggest we have the question read and let the witness give her answer?

THE COURT: You may ask any question you wish within the Rules of Evidence.

Before the Jury:

[724] THE COURT: Objection will be overruled.

MR. IRWIN: With the Court's permission, I would like to have the last question read back.

THE COURT: You mean the previous question, the one that was answered, or the one that you are now presenting?

MR. IRWIN: The last question. I don't know that—

THE COURT: May I ask then that you withdraw this question for the moment before this gets too confusing or do you wish an answer to the question you have just presented?

MR. IRWIN: Okay, Your Honor, I would like an answer to the question I presented.

THE COURT: Ms. Kuppin, read the last question.
(Question and answer read back.)

THE COURT: Present your next question, please.

Q. That is still your answer?

A. Yes.

* * * *

[TESTIMONY OF ROBERT WALKER]

* * *

[206] Q. So I'm understanding correctly, are you saying that these editors that report to you have responsibility and then you might have some kind of veto power?

A. Yeah, he could describe it that way as veto power.

Q. Are you responsible for making assignments to reporters for stories?

A. Yes, I have a city editor who actually makes assignments but I also do.

Q. Mr. Walker, I want to refer you to Joint Exhibit I which has been identified as the article at issue in this lawsuit. Were you responsible for making the assignments to the reporters investigating that story?

A. Yes, ma'am.

Q. When was it that you first became aware that there potentially was a story that ultimately resulted in this article?

A. Jim Blount come to me, I believe, on Wednesday, that date escapes me, Wednesday before this article ran, and told me we would have or we had the opportunity to interview Alice Thompson and I assigned Pam Long to do that.

Q. Did Mr. Blount at that time indicate to you what his understanding of Thompson's interview was going to encompass?

[207] A. Not at that time, no.

Q. To your knowledge, that interview did, in fact, occur the next day?

A. Yes.

Q. Did Pam Long or Jim Blount speak with you the next day, that is October 27, about what did in fact occur at that interview?

A. Yeah, I asked them—when the interview was complete and they came back, I asked them what did she say or what did we learn and they gave me a real kind of quick overview and Pam later prepared a transcript.

Q. Did she give you the transcript that evening?

A. I can't—I don't believe she did. I think I got it on Friday in advance of a meeting we had.

Q. Was it on Thursday evening when you met with Mr. Blount and Miss Long that you decided to call that Friday afternoon meeting?

A. I can't say for sure whether I decided that Thursday evening or Friday morning.

Q. But in any event, ultimately Miss Long gave you a transcript of the Thompson interview?

A. Yes.

Q. Was that a typewritten transcript or was it her handwritten notes?

A. It was typewritten.

[208] Q. I'm going to ask you to look at Plaintiff's Exhibit 12 to identify whether this is—these are the notes that were given you?

A. Yes, I think this is what we worked from.

Q. And Mr. Walker, did you read this transcript when Miss Long gave it to you?

A. Yes.

Q. And it was pretty much on the basis of the information in here that you decided to call the meeting and investigate the story further, is that correct?

A. Yes.

Q. My understanding is Friday afternoon you did in fact call a meeting where a number of reporters were and editors were present, is that correct?

A. Yes.

Q. Do you recall who was at that meeting?

A. Bill Siebert, the city editor was there; Mike Jones, the news editor; I believe Laurell Campbell and Sue Kiesewetter. Pam Long was there. That's all I can remember.

Q. Just the best you can recall right now. What was the purpose of this meeting?

A. Well, in reading the transcript of the initial interview with Alice Thompson, we obviously had to decide

whether we were going to do a story or whether there was even a story to be done and that was going to entail interviewing [209] numerous people because Alice had referred to several people as having been at one or more of these meetings that she was describing. The reason I brought that many people together was simply that, that we were going to have to interview a great deal of people and we needed to do it quickly. One person couldn't have possibly handled that whole thing.

Q. Were you finished?

A. Yes.

Q. Now my understanding is that at that meeting those present worked on a number of listed questions to be asked to the persons to be interviewed, is that correct?

A. Yes, Pam and I pretty much led that discussion. The other people in the meeting had no idea what was going on. They wouldn't know Alice Thompson at all and some of them may have known Connaughton's name because he was a candidate but we more or less tried to formulate in that meeting the type of questions we would ask to try to get at the heart of what happened here.

Q. And in fact, you formulated exact questions to be asked, is that correct?

A. Yes, in the end.

Q. And the game plan was that all of these various people that Alice Thompson had referred to would be contacted by different individuals and asked this pre-determined list of questions, is that correct?

[210] A. Right.

Q. I'm going to refer you to Plaintiff's Exhibit 6 and ask you if you can identify that?

A. Yeah, these are the questions that we formulated at that meeting. And at the bottom are the tentative assignments that we made that day.

Q. Did you make those assignments?

A. Yes, ma'am. I didn't make these specific assignments. These were the assignments that were made at that time and were later changed.

Q. I understand that but at this point in time you made these assignments, you wanted these specific reporters to interview these specific people?

A. Right.

Q. And it indicates that Laurell Campbell is going to interview Jim Berry; Jeannie Houck interview Martha Connaughton; Larry Fullerton interview Jeannette Barnes; Pam Long interviewed Dan Connaughton and Tom Grant interviewed Ernie Barnes, is that correct?

A. Yes.

Q. There are a number of other names on there, assignments for interviews. Mr. Holcomb, Mr. Cox, Mrs. Barry, Patsy Stephens and Jim Cooney. Were assignments ever made to interview those people?

A. We assigned someone to call Joe Cox and Linda [211] Berry and Jim Cooney. We did not assign anyone to call John Holcomb and we did not assign at that time anybody to talk to Patsy Stephens.

Q. Did you at any time assign anyone to talk to Patsy Stephens?

A. Pam Long would have had that assignment but that never happened.

Q. Just so I'm understanding what you're saying, I asked if you had assigned it and you said she would have but it never happened. You mean you never made the assignment or she never got in contact.

A. After we interviewed Dan Connaughton he was supposed to put Patsy in contact with us but that didn't come to fruition, but that would have been Pam Long's assignment?

Q. You're aware, Mr. Walker, aren't you, that Patsy Stephens was supposed to be at all the meetings that Alice Thompson referred to in her interview?

A. Yes.

Q. And you're likewise aware that the offers or promises, whatever was said to Alice, was supposedly likewise said to Patsy, is that correct?

A. That's as I understand it, yes.

Q. Didn't it occur to you that it would have been good practice to contact Patsy Stephens at the same time you were contacting these other people in order to see what their [212] story was?

A. We would like to have talked to Patsy Stephens. We had no way to reach her.

Q. Did anyone make any attempts to reach her on Friday?

A. Not on Friday, no, we didn't attempt to reach anybody on Friday.

Q. Did you attempt to reach anyone, attempt to reach her Saturday or Sunday?

A. No.

Q. Monday?

A. No.

Q. Mr. Walker, could you explain to us why it was if this information came to you on Thursday, you had the meeting with the reporters on Friday, can you tell me why it wasn't until Monday afternoon that you decided to interview all these people?

A. Our meeting on Friday was very late in the day, as it often is in the newspaper business, because we were working on that day's paper first. It occurred to me that attempting to make any kind of contact over the weekend would not have been fruitful. So we decided to delay until Monday our attempting to contact these people.

Q. Now you were aware, of course, being the managing editor of the Journal News, that your election [213] guidelines provided that any new charges against candidates should be at least one week prior to the election, is that correct?

A. Yes, ma'am.

Q. And didn't it occur to you that a story with all these claims, there might be a lot of leg work and perhaps you ought to give yourself a little more time to try to verify the truth?

A. I would like to have a lot more time to verify the truth, but the weekend was not the time to try to do these interviews.

Q. Now you said to your knowledge today Patsy Stephens—excuse me, Pam Long did not try to interview Patsy Stephens at all, is that correct?

A. Not before the article was written, no.

Q. Not before the article was written?

A. Not before it was published.

Q. Not before it was published. Did Pam Long tell you she tried to reach Patsy Stephens before publication?

A. No.

Q. I want to ask that Mr. Walker's deposition be given to him, please. Mr. Walker, this is your deposition. It was taken, I believe, by Mr. Lloyd on July 20, 1984, correct, under oath when you gave this deposition and I want to refer you to page seventeen, line T down at the bottom. The question [214] was, "Did you take any steps to interview Patsy Stephens prior to running the article or to see that someone on behalf of the Journal News interviewed Patsy Stephens?" And your answer was, "I believe that Pam Long did attempt. In fact, it was my understanding from Pam that Dan was supposed to make some arrangements for us to talk to Patsy Stephens." Is that correct?

A. Yes.

Q. And then the question says, "What's the basis for your belief that Pam attempted, Pam Long attempted to interview Patsy Stephens before this article was run?" And your answer was, "She told me that." And question, "Has Pam Long told you that she attempted to interview Patsy Stephens before she wrote this article? Is that what you're saying?" And you say, "I believe that to be the case, yes, she told me that there was a tentative agreement to meet and that that didn't come off because of a telephone call made, either Pam was leaving or Patsy couldn't come." Question, "When did she tell you that? When did Pam Long tell you that?" Answer, I can't answer that for certain. That would have been either Friday late in the day or Monday." Question, "The article came out in the paper on Tues-

day?" "Yes, sir." Question, "Pam Long told you Friday or Monday she made an attempt to reach Patsy Stephens to talk to her about this but had been unable to do so?" And the answer was, "Yes." * * *

* * *

[220] Q. * * *. On Monday night—you say that you said that on Monday night after Pam Long had interviewed Dan Connaughton, the determination was made that you didn't need to get ahold of Patsy Stephens, is that correct, what you said before?

A. No, Dan Connaughton—Pam told me that Dan said that he would put Patsy Stephens in contact with us.

[221] Q. So, you are telling me that at that point you still felt that it was important to try to reach Patsy Stephens, correct?

A. Yes.

Q. Was it your understanding that Miss Stephens was supposed to contact Miss Long prior to publication the next day?

A. That's my understanding, that Dan would talk to Patty and have her contact Pam.

Q. So as far as you know, there was an attempt of some sort being made to contact Miss Stephens?

A. Yes.

* * *

[223] Q. Okay. Now, you were also aware, from the Long summary of the Thompson interview, that Alice Thompson had told Miss Long and Mr. Blount that she had told this story to the Hamilton Police Department, correct?

A. Yes.

Q. Was anyone assigned to contact the police department about the story?

A. Jim Blount told me that he asked Tom Grant to do that.

Q. Jim Blount told that you he asked Tom Grant to go to the police and ask them did Alice tell you that Dan Connaughton made offers?

A. No, no, he just simply told me that he had asked Tom to talk to the police. I don't know what he told Tom to ask the police or—

Q. Your impression was to check general credibility?

A. Yeah.

Q. That kind of thing. You were aware at the time that the article was published that all of the other people, with the exception of Alice Thompson and Pat Stephens, who wasn't contacted, denied that offers or promises of a trip to Florida, etc., were made at this September 17 meeting, weren't you?

A. Yes.

[224] Q. Didn't that give you a reason to doubt Miss Thompson's credibility on these claims?

A. Well, no, because the two principals, Dan and Martha, when we interviewed them, agreed that there had been discussion of jobs, and trips and opening an ice cream store and it occurred to me that that was a logical conclusion, that she was being offered some job or a trip.

Q. Dan and Martha said these promises happened at this September 17 meeting?

A. No, no, Dan and Martha denied that they had made any promises, but they said that these things had been discussed.

Q. Mr. Walker, isn't it true, to your understanding that what Dan and Martha really told the reporters was that, yes, in idle conversation, "Florida" might have been mentioned, or "restaurant" might have been mentioned, but that in fact there were no discussions about any involvement with trips and these two girls or restaurants and these two girls?

A. I don't recall the idle conversation. That was the gist, I think, of what Pam was telling me, that Dan had said was that he thought perhaps they had—

Q. So when you made the decision, was it based on your interpretation of what Pam Long was telling you?

A. Yes, ma'am.

[225] Q. Pam Long reported to you that she had verified the story, that in fact, jobs and trips were discussed and Dan admitted that, that's what she reported to you?

A. Pam didn't tell me that Dan admitted that jobs and trips were offered. She told me that Dan admitted that those things had been discussed.

Q. It had come up in conversation?

A. Right.

* * * * *

[TESTIMONY OF TOM GRANT]

* * * * *

[229] Q. He did not tell you that or he did not request that you go to the Hamilton Police Department in order to verify whether Alice Thompson had told them that Dan Connaughton promised her jobs and trips in exchange for information; is that correct?

A. Yes.

Q. So the extent—so the only thing you verified for this article was that the New investigation was going on?

A. Yes.

Q. Did he ask you to check about Thompson's general credibility?

A. No.

Q. You never heard the name from Mr. Blount at that time?

A. Not at that time, that I recall.

Q. Is that the extent of your involvement?

A. I went with Pam Long on the interview with Ernie and Jeanette Barnes that Monday evening.

Q. So Mr. Blount or Mr. Walker asked you to get ahold of Mr. Barnes in order to set up the interview, correct?

A. Yes, Bob Walker did.

Q. Mr. Walker, that was because Mr. Barnes is the fire chief and because of the nature of your reporting, you [230] were friends with him, correct?

A. Yes, he's a deputy fire chief.

THE COURT: Could you speak a little better into the microphone.

Q. You did, in fact, set up an interview with the Barnes for Monday evening, correct?

A. Yes, eight p.m. that Monday evening.

Q. And Pam Long accompanied you?

A. Yes.

Q. By that point in time did you know what the story was all about?

A. No. I had not been in on the meeting. I did sense that during the interview.

Q. You were there, I take it, basically to provide an introduction for Miss Long to carry out this interview?

A. Yes, introduce them, so the Barnes would know who she was.

Q. Did you hear the questions that obviously Miss Long asked the Barnes?

A. Yes, I did.

Q. Did you—did they verify that they were present at this meeting on September 17 in the middle of the night, which was taped between the Connaughtons and Patsy Stephens and Alice Thompson, correct?

A. Yes, they did.

[231] Q. Did you hear Miss Long ask the Barnes if at any time during the course of that evening, Dan Connaughton promised either Alice Thompson, Patsy Stephens or both, any type of jobs, trips, offers, inducements of any kind? Did you hear Miss Long ask that question?

A. Yes.

Q. The Barnes denied that there were any types of offers, promises or inducements; is that correct?

A. Yes.

BY MS. LUX: Your Honor, I don't have any other questions. Excuse me.

THE COURT: Mr. Lloyd, do you wish to confer?

MR. LLOYD: I want to confer.

THE COURT: No problem.

BY MS. LUX: Two questions, Your Honor.

Q. Mr. Grant, based upon your several years of knowing Ernie Barnes and your association with him in your duties as the police reporter, you regard him as a generally credible person, is that correct?

MR. IRWIN: Objection.

THE COURT: Overruled, the witness may respond.

A. Yes, I do.

Q. Likewise, you are acquainted with Jeanette Barnes. She once worked at the Journal News and you consider [232] her a generally credible person; is that correct?

A. Yes.

* * *

[TESTIMONY OF LAURELL CAMPBELL]

* * *

[233] Q. What I'm going to question you about is your involvement in the preparation of that article. Now, as I understand it, your first knowledge that there might be a potential story which ultimately resulted in this publication was the previous Friday; is that correct?

A. Yes.

Q. You were called to a meeting by your managing editor, Bob Walker, correct?

A. Yes.

Q. Do you remember who also was present at the meeting?

A. Yes. Pam Long, Jim Blount, Sue Kiesewetter, Mike Jones, Larry Fullerton, Bill Seibert and Jeanne Houck.

Q. The substance of that meeting, as I understand it, was Long reported on this interview she had with Alice Thompson? And those of you that were there col-

lectively framed a list of questions that you were going to ask potential interviewees, is that correct?

A. Yes.

Q. Did you receive an assignment at that meeting?

A. Yes.

[234] Q. What was your assignment?

A. To interview Dave Berry.

Q. When were you to interview Mr. Berry?

A. The following Monday, October 31.

Q. Were you given discretion as to what time you could do it or was there a specific time that you were supposed to interview him?

A. I was told that he and Dan Connaughton already had an appointment at the Journal News for that afternoon and so that would be a convenient time to interview him.

Q. I don't know if the other exhibits are up there. Is there a Plaintiff's Exhibit 6 in front of you?

A. No.

Q. Pam Long was given the assignment to interview Dan Connaughton; is that correct?

A. I don't really remember. According to the list of questions, yes.

Q. Was the intent at that Friday meeting to allow Mr. Connaughton and Mr. Berry to come to this appointment and then to separate them afterwards so that the two of you could conduct your interviews?

A. I was told that after they finished the business that they had the appointment for, that then I could approach Dave Berry and speak with him.

Q. You did in fact approach Dave Berry and speak [235] with him?

A. Yes.

Q. And did you ask him all of the questions that appear on Plaintiff's Exhibit 6?

A. Yes.

Q. In doing that, you asked Mr. Berry, did you not, whether Dan Connaughton made any offers, promises of

jobs or trips, etc., to either Alice Thompson or Patsy Stephens?

A. Yes, I did.

Q. Mr. Berry told you absolutely not; is that correct?

A. That's correct.

Q. Did you report on your—the results of your interview?

A. Yes.

Q. To whom?

A. I took the notes in longhand, then transcribed them on my typewriter and put them on Pam Long's desk.

Q. So the only thing that—what you were able to verify regarding the jobs and trips from Mr. Berry was that none had been offered, correct?

A. Yes.

[TESTIMONY OF JOSEPH COCOZZO]

[237] Q. In fact, I believe there's a Joint Exhibit I in front of you, which is an article dated November 1, 1983, is that correct?

A. Yes.

Q. That is the article that forms the basis of this lawsuit, correct?

A. Yes.

Q. In fact, you were the individual who gave ultimate authority to publish this particular article, that's true, correct?

A. (Witness nods affirmatively.)

[240] Q. Your next principal involvement was on the morning that the article was actually published?

A. Yes.

Q. There was apparently a meeting in your office to review the article; that true?

A. Yes.

Q. Did you call that meeting?

A. No, I believe Mr. Blount did.

Q. Can you describe to me the circumstances of what happened, he came to you and—

A. Again, my role as publisher takes me into all the operations of the newspaper. I was generally made apprised that we were interviewing Alice Thompson. A few elements with regard to some follow-up we were doing. I was generally satisfied that my people were doing what they were supposed to be doing, but it all didn't come together until the morning of November first. There was a meeting in my office with my editorial director, Jim Blount, my managing editor, [241] Bob Walker and counsel for the newspaper, Mr. Jim Irwin.

Q. Did you invite Mr. Irwin—

A. Mr. Blount did.

Q. These people just kind of showed up at your office, no?

A. No, Mr. Irwin has been counsel for the newspaper for I guess about fifteen years.

Q. I understand, I'm sorry. You said that you didn't call the meeting. Mr. Blount did and he invited these other people and they came to your office to review the article. Do you recall how long this meeting lasted?

A. Approximately one hour.

Q. And the purpose of the meeting was to review the article for accuracy; is that correct?

A. Well, there were a number of things that needed to be discussed. First and foremost, had we done our job? Was the story fair? Was it accurate? I wanted to hear in a situation like this from my editors, their reasons why it was newsworthy. That was one primary function of that meeting. Clearly, with Mr. Irwin present, I also wanted to hear from counsel as to whether or not it was fit to print and if we were in our legal rights to print it.

Q. In discussing the matter, did you specifically—did you or Mr. Irwin specifically question Mr. Blount or

Mr. Walker about the manner in which the post-interview [242] verification process had occurred, that is, the post-Thompson interview?

A. Yes, we talked about that.

Q. So you were aware then that prior to publication, Patty Stephens had not been contacted in order to verify the story?

A. Yes.

Q. You were aware of that?

A. Yes.

Q. You were aware that no attempts had been made?

A. No, I was not aware of that.

Q. What were—

A. I was made aware that we had thought we were going to talk to her the day before. I was told that we had some reporters available 'til eight or nine o'clock. I'm not sure. But late in the evening, that on Monday night, the night before. In fact, there was some hope that we would have talked to her that Tuesday morning, prior to publication.

Q. But to your knowledge, no reporter or editor from the Journal News ever picked up the telephone and tried to contact her, did they?

A. There was some confusion on that point. In all honesty, I would have to say that the time I approved, gave my permission to run it, I had interpreted that as meaning [243] that we had an appointment, a firm appointment to talk to her. In all honesty, I learned after the fact that, yes, we thought she was coming in but it was not because we had had an appointment.

Q. I simply just want to understand what you said. Did you say at the time you approved it, you thought you had an appointment set up with her which was initiated by someone from the Journal News?

A. That's correct.

Q. So in your mind at the time of the—you gave your okay to run the article, you were satisfied that the Jour-

nal News had at least attempted to contact Patsy Stephens, correct?

A. Yes.

Q. We now know that there was some confusion on that matter?

A. Well, there was some confusion on that note. I learned later that we had been told that she would be coming in to talk to us. That wasn't a guaranteed promise, but that's the reason I had—my editors had some reporters there 'til eight or nine Monday evening, but it was not by appointment.

* * *

[247] Q. What did they tell you?

A. I was told that they had checked with the police and the police said that they were engaged in a criminal investigation and did not have the time, nor it wasn't their business to check out those claims.

Q. Who told you this? Mr. Blount?

A. Jim did, yes.

Q. Was your impression that Mr. Blount himself or someone on his behalf had contacted the police and specifically asked the police whether Alice Thompson told them that Dan Connaughton made these offers to her?

A. I surmise that from his answer, yes. Either himself or at that time, I assumed it would have been Tom Grant, because Tom was our police reporter.

Q. In fact, the police weren't asked that question. Do you have any knowledge of that?

A. It's my understanding that they were.

Q. You think that they were?

A. Yes.

* * *

[249] Q. I understand that, you know, you have a lot of stories to check out, but this particular story contains some pretty big charges against Mr. Connaughton, is that true? Would you agree with that?

A. Yes.

Q. You didn't feel that you had an extra duty, because of the nature of the allegations in that article, to doublecheck and make sure that each—that you were as accurate as you possibly could be?

A. No, I did feel that duty. That's in fact one reason why we sat in the meeting, to go over it one more time. As I mentioned, that is not something I do customarily.

Q. So you did realize or recognize the potentiality of harm of this article?

A. Yes.

[250] Q. Did you or Mr. Irwin make any changes to the article that you recall, substantive changes?

A. No, it ran exactly as it was submitted by my editors.

Q. If I recall correctly, it didn't have a headline on it at that point, did it?

A. No.

Q. Did you see the headline before it was published?

A. No.

Q. So you were not the one that approved that?

A. No.

Q. Do you know who wrote it or approved it?

A. I would, whoever was working the desk that day to clear the paper for publication. It would either have been Mr. Walker or Mr. Fullerton. I could really not tell you for sure who did it.

Q. Mr. Cocozzo, if you had known that in fact there was no appointment with Patsy Stephens, wouldn't it have been good practice to instruct someone to call her in order to verify the story or try to verify it before it was run?

A. Yes.

* * *

[1254] Q. Would you tell the jury what the terms "penetration" or "coverage" mean?

A. A newspaper's circulation is the absolute number of newspapers sold in a given area. Penetration, on the

other hand, is a relative measure. It is the number of papers distributed in an area divided by the number of potential readers in that same area. For example, if you had a hundred homes on the street and fifty people took the paper, you would have fifty percent coverage of that street.

Q. Are you also familiar with the circulation figures for other newspapers circulated within the city of Hamilton in the Butler County area?

A. Yes, sir.

Q. Why?

A. That's part of my job to know that. It's important to know what people in the community are reading.

Q. Sir, what is the circulation of the Journal News in Butler County?

A. Butler County, less Middletown, one of the northern cities in Butler County, which is an area where we don't really cover, about twenty-nine thousand papers.

* * *

[TESTIMONY OF SUE KIESEWETTER]

* * *

[294] Q. Now, when you interviewed—strike that. Did anything that occurred in the meeting of Friday, October the 28th strike you as being against journalistic ethics?

A. No. We were trying to be as fair as possible because the allegations were very serious, and it was an election year. Mr. Connaughton was a candidate, so we wanted to be particularly careful of any information we received and we went out of our way to try and get it confirmed or disapproved by as many people as we could.

Q. Did Mr. Walker, the managing—excuse me, he was the managing editor at that time, is that correct?

A. Yes.

Q. Did Mr. Walker emphasize to all of the reporters and the people present at that meeting that everybody should be careful and do it right?

A. Yes, that's why we were given a specific list of questions to make sure that we all asked the questions in the same way we had at the meeting. There was an original list of questions. We all talked about them in order that we would all fully understand what information was being asked and during the course of that, the questions were revised a little bit, and then retyped and given to each of us on Monday before we did the interviews.

Q. You did try to follow, to the best of your ability, the list of questions that had been first proposed [295] and then worked on and then typed up for you and given to you Monday, correct?

A. Yes.

Q. Isn't it true, Miss Kiesewetter, that during the interview of Martha Connaughton, that she confirmed that there had been a discussion with Patty Stephens and Alice Thompson concerning the subject of jobs?

A. Yes.

Q. Isn't it true that there was a confirmation by Martha Connaughton that there have been discussions of the concept of anonymity?

A. Yes.

* * * *

[298] Q. I take it that during the interview of Martha Connaughton, she confirmed that there had been a series of meetings with Alice Thompson and Patty Stephens, is that correct?

A. Yes, now the first one she had wasn't a meeting per se. That they had—that they were told that somebody at the Breedlove home had some interview on DUI, so they went there, and they talked with Patsy, but it wasn't a formal meeting or anything like that. The second two were more what I would consider formal meetings.

Q. I have seen your notes on—let me get the reference here—Exhibit 29, Plaintiff's Exhibit 29, page three, under paragraph 7, then there's a B?

A. Yes.

Q. Says, "she," then there's a triangle sign, "Patsy, triangle sign, would be good at it, comma, she said." This is right under the "no promise of Municipal Court job." What's your recollection of what Martha Connaughton was saying there?

A. Oh, okay. Martha said that there's no promise made of a Municipal Court job for Patsy Stephens. Martha [299] said that Patsy only had a tenth grade education. The second part, "would be good at it she said." Martha told me that Patsy Stephenson told Martha.

Q. You mean Stephens?

A. Yeah. Patsy Stephens told Martha, that she, Patsy, would be good at working in the Municipal Court.

Q. So did you take that as a confirmation of the fact that a Municipal Court job had been discussed with Patsy—Patty Stephens. Had been discussed?

A. Yes, I would think that it was discussed in some way. I don't know how though.

Q. The subject of immunity, immunity, for Alice Thompson and Patty Stephens was also discussed in that interview with Martha Connaughton, wasn't it?

A. Yes.

Q. They confirmed, did she not, Miss Kiesewetter, that there was a discussion with the Prosecuting Attorney of Butler County, John Holcomb about immunity for these two girls?

A. Yes.

Q. Do you remember what Martha Connaughton had to say?

A. Okay. Martha told me that Dan did not offer immunity to the two women, but he did say he would call up Mr. Holcomb and ask if they could be given immunity. [300] According to Martha, he did call up Mr. Holcomb

and it was his understanding that immunity would be given.

Q. Whose understanding?

A. Mr. Connaughton's understanding, but he did not offer the two women immunity.

Q. But he did attempt to secure it for them?

A. Yes, that's my understanding.

Q. In further, not only did he attempt, but Martha Connaughton was under the impression that he had successfully procured immunity or a promise of immunity from the Prosecuting Attorney, John Holcomb, is that correct?

A. Yes.

MR. CREIGHTON: Your Honor, may I have just minute?

THE COURT: Take you time.

Q. Just one or two more questions. Was there anything about the process of interviewing Martha Connaughton or Linda Berry or the discussions in the meeting on Friday where you set those interviews up, that was not standard newspaper reportorial practice?

A. No.

* * * *

[TESTIMONY OF JUDGE ARTHUR FIEHRER]

* * * *

[311] Q. Would you be good enough to pass Judge Fiehrer Joint Exhibit I, please? Now, sir, have you ever seen Joint Exhibit I?

A. Yes, sir, I have.

Q. That's the article that the Journal News published about Dan Connaughton on November 1, 1983?

A. Yes, it is.

Q. Did you see it when it came out?

A. I did.

Q. Have you examined it?

A. Yes.

Q. Now, Judge, based upon your knowledge and experience, do you have an opinion as to whether this ar-

ticle, the Journal News ran about Mr. Connaughton had an adverse effect upon his reputation?

A. I have an opinion.

Q. What is that opinion?

A. It did have an effect upon his reputation.

Q. What kind of effect?

A. It was detrimental.

[312] Q. What do you base your opinion on?

A. Well, after reading the article, where you are trying to imply that he did something that was illegal.

Q. What was that?

A. Attempting to bribe a witness, it says here, "Bribery Case Witness." That's the headline.

Q. What else in the article do you think harmful to Mr. Connaughton?

A. They were trying to imply in one of these articles about the—he was attempting to get someone to give some false testimony to the Grand Jury, if I recall.

* * * *

[316] Q. Judge Fiehrer, based upon your political experience, do you have an opinion as to whether an article of this type written about a candidate for office, published a week before the election could affect the outcome of the election?

A. I have an opinion.

Q. What is that?

A. It would affect the outcome of the election.

* * * *

[322] Q. Could you point out to me anywhere in the article where there is any statements that would leave one to believe that Mr. Connaughton attempted to get a witness to testify falsely?

A. It's probably isn't in there but when you read this headline you come to the conclusion it's something of a bribery matter.

* * * *

[TESTIMONY OF DAVID M. GREEN]

* * *

[331] Q. Have you seen Joint Exhibit 1, which is the article which the Hamilton Journal News published about Mr. Connaughton on November 1st, 1983?

A. Yes, sir, I've seen it.

Q. Did you read it when it came out?

A. Yes, sir, I did.

Q. Mr. Green, based on your experience, do you have an opinion as to whether that article had a detrimental effect on Mr. Connaughton's reputation?

A. I have such an opinion.

MR. IRWIN: Objection.

THE COURT: Overruled. You may respond.

A. I have such an opinion.

Q. Would you tell us what it is and what it's based on, please?

A. What my opinion is based on?

Q. First of all, what is your opinion?

A. My opinion is it was extremely detrimental to [332] Dan both in his campaign to be elected Municipal Judge of our community, it was devastating. As a matter of fact, it was also devastating to his law practice.

Q. One more question, sir, on what do you base your opinion?

A. I base my opinion on personal observations, and also conversations with other members of the community as well as people in my profession, and in my own experience.

MR. LLOYD: I think that's it, Your Honor. I don't have any more questions.

THE COURT: Do you wish to interrogate, Mr. Irwin?

CROSS-EXAMINATION

BY MR. IRWIN:

Q. I'm sorry, Mr. Green, I don't think I heard all of your direct. How long did you say you've known Mr. Connaughton?

A. I think about seventeen or eighteen years.

Q. And Mr. Connaughton is a friend of yours, isn't he?

A. He's a friend and professional colleague.

Q. You know him and like him, don't you?

A. I certainly do.

Q. And you were a supporter of his in the campaign?

A. No, I was not. I was a survivor in that [333] campaign. As a practitioner in the election for our Municipal Judge, which is the subject matter of this situation, I supported actually neither candidate.

Q. Did you contribute to Mr. Connaughton's campaign?

A. I contributed to both campaigns.

Q. You contributed to both campaigns?

A. I did, sir. I do a lot of business in Municipal Court and that's what I did, I contributed to Judge Dolan's campaign and I contributed to Dan Connaughton's campaign and I told them both I was going to do it, and I did it.

Q. You testified that you felt this article damaged Mr. Connaughton's law practice?

A. Yes, sir.

Q. What do you base that on?

A. In this business, sir, the only thing that you really have to sell is your reputation. That is, your reputation to exercise mature, intelligent judgment, and when you get into a situation where you have claims such that he tried to bribe Grand Jury witnesses, it can't do anything but have a detrimental effect on your business.

* * *

[338] Q. Other than that paragraph that you pointed out that has the word dirty tricks in it, can you point out anything in this article that, to your mind, can be construed [339] as accusing Mr. Connaughton of attempting to get a witness to give false testimony to a Grand Jury?

A. Additionally the things that you pointed out, I think you said they were in the 6th column in your joint exhibit there, referring to a job for Thompson in appreciation for her help with Connaughton's investigation of Billy New and Judge Dolan, a Municipal Court job, the Stephens, an indication to Thompson, her sister to go on a possible post-election trip to Florida with Connaughton and his family, set up Thompson's parents, Zella and Brownie Breedlove in the restaurant business at the location of Walt's Chambers which Connaughton owns and leases at his property on Court Street opposite the Butler County Courthouse next to Connaughton's law office. These are the things, in my opinion, lead me to the conclusion I responded to.

Q. Those paragraphs lead you to the conclusion Mr. Connaughton was trying to get these people to give false testimony to the Grand Jury?

A. Those are the things that he was accused of doing by this article. By offering them to whatever the people's names were, Mrs. Thompson, or whatever those were, allegedly the inducements. That's what I got from this article.

Q. Inducing them to do what?

A. Inducing them to testify.

[340] Q. Just to testify?

A. Yes.

Q. To come forward with the truth, correct?

A. There was a pending Grand Jury investigation and it was the worst kept secret in Hamilton.

THE COURT: Mr. Green, I really don't want to admonish you again. Read the question please.

(Question read.)

A. To come forward with the truth, yes.

* * *
[TESTIMONY OF JEANETTE BARNES]
* * *

[350] Q. Now we are skipping a little bit, but I want to ask you about this single issue. During that interview, did either of them ask you whether the tapes ran continuously or how the tapes ran?

A. They asked—I think it was were the tapes turned on and off or off and on.

Q. What did you say?

A. I said he punched the tapes on. They ran all the time. My husband said, "Except for stops to change the tapes, to get drinks and once when there was trouble with one machine." I said that's exactly right.

Q. Going back to the meeting at the Connaughton home that we began to talk about. I'll ask you whether during the time that you were there, Mr. Connaughton ever made any offer or promise of any jobs or trips or anything else, either to Patsy Stephens or Alice Thompson?

A. Absolutely not.

Q. Did anyone else who was there ever make any promises or offers to either of those ladies?

[351] A. Not that I heard.

Q. Now, you've already said that two representatives of the Journal News interviewed you about that meeting?

A. Uh-huh.

Q. When was that?

A. That was October 31.

Q. Where was the interview?

A. It was in our home.

Q. How was it set up?

A. My husband had invited Tom Grant.

.

[361] Q. How soon after the people arrived at twelve-thirty, Alice and Patty, did you begin the tapes that you talked about?

A. Almost immediately, after the introductions were made, I would say five, ten minutes, maybe sooner.

Q. When did you leave?

A. Well, let's see, we left about two or three minutes after they did.

Q. After who did?

A. Joe Cox and Dave Berry and Alice and Patty.

Q. What time was that?

A. I'm not sure, but I do remember commenting when we got home, we got in bed and I said, "It's five o'clock in the morning."

Q. So is it your testimony that you were there the [362] entire time that Alice Thompson and Patty Stephens were there?

A. That's right.

Q. That's four and a half hours, isn't it?

A. That's right.

Q. Have you ever listened to the tapes that were made of that meeting?

A. I've never heard them.

Q. If I told you that they were played in this court and that the tapes were represented to be three one hour cassette tapes, would that recall anything to you about how long the tapes were on?

A. No.

Q. If I told you that, as a matter of fact, the tapes lasted two hours and twenty minutes in this courtroom, would that surprise you?

A. However long we were there.

Q. Well, the tapes were two hours and twenty minutes and you were there almost four and a half hours. Do you have any explanation for that?

A. I don't.

MR. LLOYD: Your Honor, I want to object.

THE COURT: Overruled. Cross-examination. You may proceed.

MR. LLOYD: May I be heard?

[363] THE COURT: Yes.

At Side Bar:

MR. LLOYD: Well, I don't want to make a big deal of it, but there's no evidence that as to how long the tapes were played in this courtroom. I don't really know and unless he—maybe actually timed it, I think he's just asking something that she may not know, I don't know.

THE COURT: Hold on. I can give you a pretty good idea. We heard tapes from 3:10 to 4:20. Hour and ten minutes on Monday, August fifth. We heard tapes from 9:05 to 10:20. That's an hour and fifteen minutes, so that's one fifteen, plus one ten.

MR. CREIGHTON: I'm sorry, Your Honor, I was off five minutes.

THE COURT: I think these are perfectly appropriate questions, because that statement has been made before that they were together until about five o'clock in the morning. I think it's arguable in terms of their contention, I presume that the tapes—that the taping machines were off for a substantial length of time. Let's go forward.

[364] Before the Jury:

THE COURT: Objection overruled.

MR. CREIGHTON: Your Honor, I apologize, I can't remember what my question was.

THE COURT: Read the question please.

(Question read.)

A. I don't, other than the tapes were changed, different intervals, maybe two or three times. I don't recall now. But they were changed and drinks were gotten for everybody, soft drinks were gotten to everybody and there was trouble with one of the machines at one time.

Q. You said that during the meeting soft drinks were gotten for people?

A. That's right.

Q. Did you leave the room at any time?

A. I did not.

Q. Four and a half hours and you didn't go to the bathroom or anything like that?

A. No, I didn't.

Q. Is it your testimony that you heard every word spoken by either one of these women that night?

A. As far as the interview was concerned, I did. When there was some chit-chat going on and everybody talking at once I didn't hear everything.

Q. What you're indicating was there was an interval [365] and there was chit-chat and you're making a distinction, is that right?

A. That's right.

Q. In the chit-chat session, I assume there were more than one chit-chat session, is that right?

A. No.

Q. Just one?

A. Initial introductions were made and the tapes were turned on. It wasn't any chit-chat other than who wanted what kind of drink, Pepsi or Coke or whatever like that.

Q. Did Mr. Connaughton ever signal with his hands for the tapes to be turned off?

A. He did not.

Q. Did Mr. Connaughton ever make any remarks about how he was just so surprised, kind of blown away

by what he was hearing on the tapes? Did you ever hear anything like that?

A. He might have said something after the tapes were turned off about these were serious allegations and very difficult to believe.

Q. There was some conversation that occurred after the tapes were turned off and before you left the room, is that correct?

A. Right.

Q. So we have before the tapes were turned off there was some chit-chat?

[366] A. Just introductions.

Q. That you could hear?

A. Right.

Q. And then during the taping there were times when they were turned off to change them?

A. Yes.

Q. And there were no discussions during the changing other than just to get drinks and there was no questions or anything directed to Alice Thompson and Patty Stephens?

A. No.

Q. Did anybody continue talking while they were changed?

A. No, not that I noticed.

Q. But it could have happened without your noticing?

A. I don't think so. It was sitting right in front of me.

Q. Now, were you aware of the fact that after that September 17th meeting at the Connaughton's that there was a session with Patty Stephens where she took a lie detector test?

A. I think Martha mentioned that to me.

Q. You weren't there, were you?

A. No, I wasn't.

• • • •

[TESTIMONY OF ERNEST BARNES]

* * *

[375] Q. What is your title, sir?

A. I'm a deputy chief in charge of training and paramedic program.

Q. City of Hamilton?

A. Yes.

Q. How long have you had that job, sir?

A. 23 years, a little more.

Q. Jeanette Barnes is your wife, right?

A. That's correct.

Q. And the two of you were present at the Connaughton's house on the 17th of September, 1983, is that right?

A. Yes.

Q. And at that time Miss Stephens and Miss Thompson were there, is that right?

A. Yes.

Q. And they were interrogated by Mr. Connaughton and Mr. Berry at some length, were they not?

A. Yes.

Q. During that entire meeting—by the way did you hear the entire discussion that took place between Mr. Berry and Mr. Connaughton, Miss Stephens and Miss Thompson?

A. Yes.

Q. At any time did Mr. Connaughton or anyone else [376] make any offers to those two ladies of any jobs or trips?

A. No.

Q. You're certain of that, sir?

A. Yes, I am.

* * *

[TESTIMONY OF
MARTHA JANE CONNAUGHTON]

* * *

[397] Q. Can you tell us briefly how did it come that you were at Patsy Stephens' home having a conversation with her?

A. Yes. About a week prior to that date, I think it was about September 8, I had a conversation with June Taylor who is president of the MADD organization of Southwest Ohio, and she gave me some information when I was at her home and she handed something to me, as best I can recall, and she said, "This is something I think might help you with your campaign." And it was something to do with a court, something to do with court, a receipt or something with a Jack Sheiffer's name on it. And she told me that his wife could help us, something to that affect, I'm not exactly sure about the conversation.

Q. How did this lead you to Patsy Stephens?

A. June Taylor told us that Pat Stephens was divorced from Jack Sheiffer so we really didn't know where Pat Stephens lived, so my brother, David, went to Domestic Relations and they had records of divorces there and found that Pat Stephens was actually the Pat Shevers who had taken back her former name, which was Stephens, after her divorce.

Q. So you went out to speak with Miss Stephens on September 15?

A. Right.

Q. Who else was present during this conversation?

A. David Berry, my brother, and Pat Stephens' mother, Zolla McQueen.

[398] Q. Could you just describe in brief terms what was discussed at this meeting?

A. We just introduced ourselves, I think we might have shown her our driver's license so she would know who we were, and we told her why we were there, that

June Taylor gave us her name and she thought she might have some information about Hamilton Municipal Court and she—she just told us a little bit about some of her experiences in Hamilton Municipal Court.

Q. As best you recall, was Alice Thompson present at this particular meeting?

A. She walked in during the meeting, the conversation, she just walked in and sat down. She was living at the same address.

Q. Did Miss Thompon participate in the conversation?

A. Yes she did, she volunteered some information about her experience she had had in Hamilton Municipal Court.

* * *

[400] Q. Let me back up a second. Can you remember or recall approximately how long you were at the Stephens/Breedlove home on September 15 when all of you were present?

A. I would say might have been a half hour, 45 minutes at the longest.

Q. Now when Mrs. Breedlove phoned you on, I think you said Friday afternoon, did you make arrangements with her as to when the meeting was to be held?

A. Right, she told me that the girls were working at Rink's and they would be home around 11:30 or midnight and she asked me if we would make arrangements to pick them up and I said yes, but I was sure that my brother, David Berry, and Joe Cox would not want to sit in a car on the street at that time at night. She said, "That's fine, tell them to knock on the door and they can come in and we'll sit and wait for them and have coffee."

Q. And did Mr. Cox and Mr. Berry, in fact, pick the girls up?

A. Yes they did.

[401] Q. And they brought them back to your house, correct?

A. That is right.

Q. Who was present at your house?

A. When he got back to our house Mr. and Mrs. Barnes and myself, and Dan was there.

Q. Okay, and then—

A. And then, of course, David Berry and Joe Cox came in with Pat Stephens and Alice Thompson.

Q. Do you recall approximately what time it might have been when they got to your house?

A. I think it was shortly after midnight, maybe about 12:15, 12:30, somewhere in that timeframe.

Q. We've heard tapes of what occurred during—

THE COURT: May I see counsel.

At Side Bar:

THE COURT: We reach a point sooner or later where all you're doing is going over the same materials, Ms. Lux, and I don't think that's right. Now this jury has sat with reasonable patience while you have explored minutely and exhaustively. I'm not going to let you do it again. If you want some general questions of this witness feel free but you may not go through word for word and incident by incident what occurred. It's time to get this cash furnished with.

Before the Jury:

[402] BY MS. LUX:

Q. We were discussing the meeting on September 19, 1983. During the course of that meeting, did you or your husband or Mr. Cox or Mr. Berry discuss in any manner any jobs, trips, or any other offers or promises of any material goods to these girls in exchange for what they were telling you?

A. No.

Q. The meeting was tape recorded, is that correct?

A. That is correct.

Q. Do you recall Mrs. Connaughton, whether during the course of that tape recording Alice Thompson asked you or your husband what she was going to get out of this?

A. No.

Q. When was the next time you saw the two girls, two women, excuse me?

A. After the morning of the 17th. The next time I saw Alice Thompson and Pat Stephens was the morning of the polygraph test.

Q. How long were you with Miss Stephens and Miss Thompson on that day?

A. Well, in the morning someone picked them up for the polygraph test. I don't know who, and I sat over in the interior decorating studio with Alice Thompson while we waited for her sister, Pat Stephens, to take the polygraph test and I think that was over with around noon and after that I went to my [403] husband's office and after it was finished, that was about three hours, in the morning, is that what you mean?

Q. How long were you, Mrs. Connaughton, with the girls that day?

A. From the morning until in the evening.

Q. Did you at the time that you were with Miss Stephens and Miss Thompson that day, did your husband or yourself ever promise them any jobs, trips, dinners or anything else?

A. No.

Q. Dan wasn't with you that entire time?

A. No.

Q. Was it basically just you and Miss Thompson and Miss Stevens in the afternoon?

A. Yes.

[404] Q. Did you during that afternoon when you were alone with the two girls discuss jobs, trips, promises?

A. No.

Q. Did you say anything at all to Alice Thompson or Patsy Stephens during the course of that afternoon which they could interpret as promises, trips, dinner, whatever?

A. No.

Q. Between the time of the day of the polygraph test and November 1, 1983, which is the day the article came

out, did you personally see Patsy Stephens and/or Alice Thompson again?

A. Yes, I did. Pat Stephens called me—I don't even know when this was, to put a date on it. She called me and said they were concerned about their safety and she wanted to talk to me about it, so I went over. She asked me to come over and pick them up. I did. We went over to Frisch's, which was close to where they lived and had a Coke in the car.

Q. Miss Thompson was present?

A. Yes, she came along.

Q. During the course of that conversation, did you at any time discuss promises or offers of jobs, trips?

A. No, we did not.

Q. Is that the only other time between the polygraph test day and the November first that you saw the two girls?

[405] Well, I think it was.

Q. Did you receive a phone call on October 31, 1983 from anyone at the Journal News?

A. Yes, I did.

Q. Who called you?

A. Sue Kiesewetter, a reporter.

Q. About how long did you talk to Miss Kiesewetter?

A. She called late in the afternoon around four o'clock and we talked about an hour.

Q. Did Miss Kiesewetter ask you—I assume she asked you questions about all the meetings we have just discussed?

A. Yes, she did.

Q. Did you in response to her questions indicate that neither you nor your husband, nor anyone associated with the campaign had ever made any offers or promises to these two women, Patsy Stephens and Alice Thompson, did you tell Mrs. Kiesewetter that?

A. That we did not?

Q. Uh-huh.

A. Yes, I did tell her that.

Q. I think in the article there's some references to a restaurant that you were going to open up or wanted to open up or something like that. Did you ever discuss that with Patsy Stephens or Alice Thompson?

[406] A. Yes, the afternoon of the polygraph test, Pat Stephens was telling me about her restaurant that she had had for about four months, the Homette Restaurant in Hamilton and at that time I just told her that I had always had kind of a dream of having a little restaurant in a bar that's in the same office building as my husband's law office, which is right across from the courthouse and next to the post office. I thought it would be a good location for something.

Q. Did you, when you were talking with Miss Kiese-wetter on October 31, did you tell her about that conversation?

A. Yes, I did, I explained that to her.

* * *

[412] Q. I think I want to go directly to the meeting of September 17.

A. Okay.

Q. I understand that it began sort of on the evening of the sixteenth and went into the morning of the seventeenth so I'm going to use the seventeenth as the date.

A. Okay.

Q. You testified that the girls, Patsy Stephens and Alice Thompson arrived around twelve-fifteen, twelve-thirty?

A. That's correct.

Q. Would it be correct that they left around 4:15, 4:30, thereabouts?

A. That's correct.

Q. They were in your home a total of four hours?

A. Approximately, yes.

* * *

[TESTIMONY OF DANIEL E. CONNAUGHTON]

* * *

[429] Q. What had you been advised about them, and by whom?

A. My wife had told me that through the conversation she had with June Taylor and then, I guess, confirming that with Pat Stephens herself, that her ex-husband, Jack Sheiffer, had had innumerable amount of driving under the influence charges and as far as she was concerned there was never any real punishment that was ever exacted upon him and she was concerned that he was permitted to continue to drive and continue to drive and I think that, coupled with the fact that her own son had been hit by a drunk driver when he was 5 years old, is what really threw her over the edge in wanting to get something done about this. There could have been some other allusions, alluding to some other things going on in the operation of the Hamilton Municipal Court but I don't think I was ever advised of any specifics or names or what it was. The thrust of it was about her ex-husband Jack Sheiffer.

Q. Did you set up a meeting with her, you arranged to have one set up?

A. I did not but—

Q. You caused one to be set up, let's say?

A. In a sense that Mrs. Breedlove called my wife [430] to set it up.

Q. You agreed to it then?

A. Yes.

Q. And did you make arrangements for when and where the meeting should be?

A. No, I had no participation in it at all.

Q. Who did all that?

A. Martha, my wife, with Mrs. Breedlove made the arrangements.

Q. Did you arrange for people to be there that night?

A. No.

Q. Well, what did you do with respect to the meeting except show up, ask questions and listen to answers? Just tell us, for instance, did you decide that you wanted the Barnes there?

A. I had nothing to do with asking them there. I was told they were going to be there and that was perfectly fine by me. Upon hearing it I thought it was a good idea to have someone that had nothing to do with our campaign to sit in and be observers and hear what we were going to do.

Q. Did you arrange to have Mr. Cox and Mr. Berry there?

A. I didn't arrange it but I, of course, knew they were going to be there.

[431] Q. Now, did you make any plans to have any statements that might be made put on tape? Did you make any plans to do that before the meeting? There were statements put on tape, were there not?

A. Yes.

Q. Who made those plans to do that?

A. I think I do believe I brought a tape recorder home from the office. One of mine at the office was used and the other one may have been Dave Berry's but I'm not positive.

Q. Now as I understand it, Mr. Berry and Mr. Cox came over to the house and they brought these two ladies, Miss Stephens and Miss Thompson, in their car, right?

A. That's correct.

Q. And do you know, did they get there a little after midnight or between twelve and one or approximately that time?

A. My best guess is 12:30.

Q. And without going into every detail, just tell us what happened and what you did and what you said and what these two ladies did and said?

A. When they arrived at my house with Joe Cox and Dave Berry, the Barnes were already there and I was talking to them and Marthy was there and I suppose the

normal amenities, introduce everybody that was there, including the [432] Barnes, and asked where they would like to sit, like to have a Coke or another soft drink and as on any occasion when you meet someone I suppose there was a little talk, two or three or five or ten minutes before either Dave Berry or I said, "Well, we have these tape recorders," which, of course, was self-evident. They were big ones sitting on tables four feet from them and "Does anybody mind if we have this recorded," and nobody lodged any objection so they were turned on and my brother-in-law probably did seventy-five to ninety-five percent of the talking on the tapes just asking questions.

Q. I have to ask you this question. Did you and your brother-in-law or you or your brother-in-law or anyone else have any preconceived questions established to ask these women at that meeting?

A. No, sir, we had absolutely no idea what direction this was going to take and what they were going to talk about.

Q. Did you ever have a situation—was there a situation where first you had a discussion and then you, after you heard the answer then you decided, well, now comes the time to start and put it on the tape. Was it that way?

A. Absolutely not.

Q. Did you ever say, "I'm going to ask you this and now I'll turn the tape on and get your answer?"

A. Absolutely not.

[433] Q. Did Mr. Berry do anything like that?

A. No, sir.

Q. You know, everybody in the courtroom knows that you've heard the statement made that you made promises of jobs and trips to these ladies that night and either you or your wife supposedly made some promises of jobs and trips or celebration or something later on. So I guess I need to simply ask you whether during that entire meeting you made any reference to any jobs or trips or prom-

ises or offered anything or said anything that could even be reasonably interpreted, misinterpreted as an offer or promise of anything. Did you?

A. Never at any time.

Q. And did you talk on the tapes—was your voice on the tapes from time to time?

A. Sure.

Q. Did you lead these ladies or try to suggest answers to them or get them to say anything particular?

A. No. The real reason that I made some interjections into the tape from time to time, and I recall one specifically and I'm sure it was heard in the courtroom, I was very struck by the fact that Patty Stephens said she went in this special door into the Judge's chambers. Having been a city prosecutor for two years and having practiced in that court, I can tell you that you could not get a handful [434] of people, outside of attorneys, that would know that special door that locks on one side and I, in order to satisfy myself, to see if I was being told something that was the truth, I questioned her about that and asked her specifically where it was, how was it that she got into it and that sort of thing because something that striking comes out. It's really quite special knowledge. It caused me to really think that she absolutely was telling the truth.

[435] Q. Did either of these women say they were concerned about having it known that they made these statements? That is, seeking anonymity, which is sometimes confusing, but did they ask that their names be kept out of it? That's a better way to ask it, I guess.

A. After they said all that they had to say, which however long that took and the tapes were turned off and everybody was going home, I suppose ten or fifteen or twenty minutes, people were sitting around, just unwinding, and I do recall one of the two of them expressing some concern about, well, what's going to happen now, or can we be protected or something along those lines. I do recall that. I do recall myself responding—

Q. Okay, now. You responded to that?

A. Yes, sir.

Q. What did you say?

A. Well, I told them, that you never know where something like this is going to go and where it's all going to end, but if protection was needed for them, I'm sure that it would be provided by the police or the Prosecutor's Office or whoever.

Q. Did you promise their names would never come out in public?

A. No, sir. They expressed that concern. I can't say who it was specifically. I said, "Only thing I can tell [436] you is I really don't know where this is going to go, but insofar as I might have control over these things, we would try to keep your names from being prominently displayed in the public," so far as I could. It was very difficult to me to give anybody any answers about something that was so sickening and, to me, when I heard it, that I had really no idea what I was going to do.

Q. Well, now, I want to ask you this. There's been discussion in the trial of immunity. I don't think anybody has ever defined it. What's meant by immunity in this context?

I want to ask him whether they asked for—that he could get them immunity.

THE COURT: I'm not sure, Mr. Lloyd, that that's a proper question. Isn't that a matter of law?

MR. LLOYD: It's a matter of fact in this context, what it was they were asking for. He's been a prosecutor.

THE COURT: I understand, but I'm not going to permit him to testify.

Q. Did they ask you for immunity, to get them immunity?

A. That issue also came up in connection with their wanting to know about police protection, safety and I told them that I had worked for John Holcomb for two years, [437] customarily and it's almost axiomatic that

if something is leading to charges of people in a higher up position or something that people who are choosing to testify would be granted immunity and there would be no prosecution. That's the way that the system works.

Q. In fact, were they given immunity?

A. Yes, they were.

Q. By Mr. Holcomb?

A. Yes.

Q. You asked him for it?

A. Asked him for it on at least two occasions and once in their presence. I talked to him on the phone with them in my office.

Q. I need to ask you this. To what extent were these tape recorders turned on and off during the course of that discussion?

A. They obviously were turned off and on when you changed the cassette players and had to turn them over. There was some malfunction of some kind with one of the machines at one time. I don't know what it was. It got repaired, but it wasn't working right for a minute. But other than that, when those opportunities would arise, maybe somebody would get a soft drink or a Coke. Somebody might have to use the restroom, but, and I remember one occasion that Dave Berry was asking some questions and I just felt [438] that he was getting far afield or just going off into a tangent that had no end. I seem to remember I went something like this and went like this, just very quietly and he just went on to something else.

Q. Did any—I'll call it substantive discussion, if you understand my word, take place while the tapes were turned off?

A. Not at all.

Q. In other words, no—was there any discussion of the topics that you were discussing on the tapes when the tapes were turned off?

A. No, sir.

Q. But I guess what you did say was after the tapes, the discussion was held on tape, that's when the ladies discussed their concerns and fear that something might happen to them; is that right?

A. That's correct.

Q. I want to ask you this. Did you at any time say to either one of these ladies, "I'm going to use these tapes, take the tapes and play them for Dolan or New or both of them and try to force them to resign?"

A. No, sir.

Q. Did you ever allude to doing anything like that?

A. The only remark that I ever made—

Q. Is the answer to that question yes or no? Did [439] you ever allude to doing that?

A. No, I did not allude to it.

Q. Do you want to say anything more? Go ahead.

A. Well, alluding is the kind of a word—

Q. In other words, did you say anything that could cause anyone to misunderstand?

A. No, sir.

Q. Okay. Well, did you make any reference to what Judge Dolan, you thought he would do if he heard those tapes?

MR. CREIGHTON: Your Honor.

THE COURT: I'm going to sustain the objection.

MR. LLOYD: That's okay. I don't need to ask the question anyway.

THE COURT: Disregard the last question.

MR. LLOYD: Your Honor, I want to consult co-counsel for just a second.

THE COURT: Take your time, Mr. Lloyd.

Q. During that discussion with those ladies at your house that night, did either Alice Thompson or Patsy Stephens say, "What am I going to get out of this?"

A. Never.

Q. At that time, did you have any plans, did your family have any plans to leave Hamilton after the election?

A. No.

[440] Q. Was there any discussion at all of a family vacation?

A. None whatsoever.

Q. Did you or anybody else say anything about going south?

A. Alice Thompson was expressing the fact during a break or something that she was kind of chilly over there and someone did give her a sweater or blanket. Somebody said, "Well, it might be nice to go south right now," or something to that effect. I remember hearing a remark like that. I didn't say it and there wasn't a discussion. Somebody made a comment.

Q. At the conclusion of that meeting and you might as well tell us when you think it broke up. When did it break up, as best you can recall?

A. 4:30.

.

[450] Q. Did you say anything in the presence of Miss Stephens or Miss Thompson when you were—about Mr. New's resignation?

A. Just that I can't believe he resigned or wanted to know why or how he resigned or it was done in a fifteen minute period or something, as I understand, just couldn't understand it and didn't know the reason for it.

Q. Did you ever say at that time, "Now I know I have to file charges"?

A. No, sir.

Q. Do you remember anything more about any conversations you had with or in the presence of Miss Stephens or Miss Thompson on that day?

A. No. I think they left shortly after I got back that evening and within fifteen or twenty minutes or so, someone took them will home. It wasn't me. That's the last contact.

Q. Then what, if anything, did you do next about this matter of what was on the tapes?

A. I think it was on Monday, the twenty-sixth of September, just by the most peculiar happenstance circum-

stances, a gentleman that she had mentioned in her tape, guy named James Smith—

Q. Who is she?

A. Patsy Stephens had mentioned. I thought I knew [451] who he was and I called him up. He came into my office. He confirmed to me collaterally what Patty Stephens had told me.

I then called the city law director.

Q. Don't tell us what somebody said to you.

A. I understand.

Q. Just what you said and what you did based on what somebody said.

A. A meeting was set up.

Q. Who is the city law director?

A. Les Koehler. I met with Les Koehler, Jeff Landrith, the city safety director and Tom Knox, the chief of police, over in Les Koehler's office. I believe that was on Monday, the twenty-sixth.

Q. What did you tell them about the tapes, if anything?

A. I told them basically the same thing that I told John Holcomb and Richard Wessel, that what I thought the allegations were and that they were very serious.

Q. Did you do anything specific after you had that meeting with those gentlemen?

A. I was advised that if I wanted police investigation, that I needed to file a piece of paper with them and they would go forward and proceed to investigate it. I went back to my office and dictated such a letter and I think hand-carried it over to Jeff Landrith's office.

[452] Q. Did you deliver it? I mean was it placed in Mr. Landrith's, the safety director's hands?

A. I think I gave it to his secretary.

Q. What was the substance of what you prepared and had delivered to him?

A. Something to the effect, I really didn't know what they wanted, but I just said, "I'm aware of what I believe are serious allegations concerning the operation of

Hamilton Municipal Court." Went on to say that I was told by someone that—I don't know if I said bribery scheme or I don't know how I characterized. It was two or three short paragraphs and I signed my name.

Q. Where were the tapes at that point?

A. I had them.

Q. Did you ever deliver either of the sets of tapes to anybody else?

A. Yes.

Q. When did that happen?

A. Well, I had to file this complaint and I did. I think it was on a Tuesday and within twenty-four or forty-eight hours two policemen appeared at my office.

Q. Who were they?

A. I think it was Don Dose and Jim Schmidts, I think.

THE COURT: May I see counsel, please.

[453] At Side Bar:

THE COURT: Mr. Lloyd, I think you are getting off the point. I don't think this has a thing to do with whether they libeled him. I don't care what he did. The question is, what did they do. We have been at this what, for almost an hour on really minutiae that doesn't bear on this.

I don't know what the significance of this is. His good faith, his bona fides are not in issue.

MR. CREIGHTON: Your Honor, I would rather let Mr. Lloyd continue, because a lot of the things that he is saying we intend to dispute, very heavily.

THE COURT: If you don't object, I'm not going to. Let's go forward.

Before the Jury:

By Mr. Lloyd:

Q. What happened when these policeman arrived at your office?

A. Advised them orally of what I knew and I delivered one set of the cassette tapes to them.

. . . .

[455] Q. Excuse me. Who was Jeanne Houck? What was her position at the Journal News at the time?

A. Reporter.

Q. Who initiated that contact?

A. I think my brother-in-law did.

Q. Why is that, if you know?

A. For the reason of going to the Journal News to explain to them what I've just explained here about the procedures I went through when I finally advised the city law enforcement officers about this and the charges went forward. I just wanted to tell them when I had received the information and how this whole thing came about.

Q. Do you know whether you or Mr. Berry initiated the contact with Jeanne Houck, before or after the Enquirer article about Judge Dolan came out?

A. I don't know. I really don't know.

Q. In any event, was there any meeting arranged as a result of Mr. Berry's contact with Miss Houck?

A. Yes. . . .

. . . .

[465] Q. Do you remember saying, "You can understand how Alice Thompson might feel betrayed?"

MR. CREIGHTON: Objection.

THE COURT: I think I'll allow that question and only that question. You may respond.

A. Yes, I made that statement, that I understood how she might feel betrayed.

Q. What was the basis for that answer?

A. Well, she was getting an enormous amount of pressure from street people who were calling her all kinds of [466] names and she was very disturbed and upset by the fact that her name became public and I'm sure she attributed that fact that I was the cause of that and while, as I asserted before, I never promised anonymity or any such thing. I told the Journal News that I could understand how she could feel—

. . . .

[470] A. I believe that the article portrayed me as a person that engaged in, at the very least, unethical conduct if not illegal conduct and certainly portrayed me to be a person that would be unfit for public office and I think contained therein is the intimation that I was a person that was suborning perjury and trying to alter grand jury testimony in some way.

THE COURT: You used a word that the jury may [471] not understand. Would you explain what subornation of perjury means?

A. That happened—the person that's in charge of or attempting to charge the grand jurors would be testifying before the grand jury.

THE COURT: Members of the jury, the term subornation means to procure. Subordination of perjury is to procure perjured testimony.

A. Finally, by intimation, I think there is a part of the article that suggestions that I had attempted to blackmail the incumbent judge by presenting him tapes in order to get him to resign.

* * *

[474] Q. Would I be accurate in saying that you've had a substantial amount of your practice centered around the Hamilton Municipal Court?

A. Certainly a good portion. I would hate to get into percentages, but it would be a fair statement to say I certainly actively practiced out in that court quite a bit.

Q. When did you decide to run for judge?

A. I suppose I made the decision towards the end of 1982.

Q. Am I correct that you filed your, is it a petition for election?

A. I don't know what the formal terminology is but your candidacy petition or whatever you're required to do, filing fee, certain amount of signatures, I think it was in February of '83.

Q. If I told you it was March 24, would that—

A. That's fine.

Q. You wouldn't disagree with that if I told you that was the date?

A. No, I just didn't remember.

Q. Would you agree with me that as a first time candidate, that an apt description would be that you were a [475] political novice? You had never been a candidate for any other elective post at that time?

A. I guess that's a fair characterization given the fact I had not run before. That would be an apt term I suppose.

Q. Your brother had run for that very seat on the Hamilton Municipal Court six years before that, correct?

A. Twelve years before.

Q. He had run against Judge Berry?

A. That's correct.

Q. And Judge Berry had defeated your brother?

A. That's right.

* * *

[485] Q. When you met Joe Cocozzo, did he display any animosity towards you personally?

A. No.

Q. Did he give you an attentive ear? Did he listen to your story.

A. Yes.

Q. Was Bob Walker present, did you say?

A. No.

Q. You don't think Bob Walker was present? If he would remember that, you would simply disagree with him?

A. Yes, I would.

Q. Do you have the Defendant's Exhibits in front of you there, sir?

A. Yes, I do.

Q. Would you turn to Exhibit C and, Your Honor, I would like at this time to use one of my blown-up exhibits.

THE COURT: You may do so.

Q. Your Honor, I want to correct the record on something, that's Exhibit D, not C.

Q. Would you tell the jury what Exhibit D is, sir?

A. This is a letter that I prepared and submitted to the Journal News to the editor letter.

Q. Did they publish it?

A. Yes, they did.

Q. Why did you write this letter?

[486] A. This was in response to a series of letters that I had been seeing in the Journal News that were printed with quite a bit of regularity, that was questioning my motives, the timing of what I had done, and generally charging me that this is, obviously, your classic case of dirty politics, that someone is releasing some information that he'd had forever for political purposes only.

Q. Is it your contention that there were letters to the editor published by the Journal News in which somebody said that you were guilty of dirty politics?

A. I think that's right, and others as well. That's my best recollection.

Q. You don't have any of those here with you, today do you?

A. No, I don't have them with me.

. . . .

[496] Q. Going back for a second to your statements in the letter to the editor of October the 20, 1983, which was Exhibit D. Your position in that letter was that September 17 was the first time that you realized that Billy J. New was doing something improper, something illegal in Judge Dolan's court, is that right?

A. That's right.

Q. Had you ever told anyone else prior to that time that Billy Joe New was doing something improper?

A. I made an offhand statement to two local attorneys one evening, saying that very same thing.

Q. When?

A. It was right after the Butler County Fair, right during it. I was out at the Butler County Fair every night. It was one of those nights towards the end of the Butler County Fair, which is usually about the end of July.

Q. Mr. Deputy Clerk, would you please provide the witness with his depositions?

Mr. Connaughton, why did you tell Judge Spillane [497] and Matt—I'm sorry, you didn't mention their names, did you? Who were the two lawyers?

A. You had them right.

Q. Judge Leslie Spillane, who is a judge in the county court, correct?

A. Right.

Q. And Matthew Crehan, who is an attorney in the Hamilton area?

A. That's true.

Q. Why did you tell Judge Spillane and Matthew Crehan that you had information about Billy Joe New and something going on in Judge Dolan's court, did you say in early August?

A. Are you quoting what I said?

Q. No, sir. Why did you tell them something about Billy Joe New in early August?

A. I told them that in response to Matthew Crehan, who was my opponent's biggest supporter. One of his biggest supporters, continuing to trying to talk me out of running for Hamilton Municipal Court judge. I was getting a little bit weary of it. It was also combined with a response to—this was right after the federal tax lien was printed in the paper. I made the normal conclusion and assumption that somebody from their camp was the one who put the Journal News on to this. So I thought that I would cause them not to be [498] bothering me any further and so I said "Well, I'll tell you what, if this is the way the campaign is going to be run, this is the kind of things that are going to go on, I've got

all kinds of stuff on Billy Joe New. I'm going to blow him out of the water." I did make a statement. I sure did.

Q. That was a story, wasn't it, sir?

A. That was a falsehood, sure.

Q. Did you indicate that that information had something to do with Judge Dolan?

A. No, I made one comment, couched very closely to what I just told you, end of subject.

Q. So you were playing a dirty trick on them, weren't you?

A. I wouldn't characterize it in that fashion, but—

Q. Well, it was a trick, wasn't it?

A. I thought it was a trick, yes.

Q. You told them a lie?

A. I did.

Q. Did you say anything else to them that night, that you can recall, about that very subject, just that subject?

A. No.

THE COURT: May I see counsel, please?

At Side Bar:

THE COURT: Mr. Creighton, I want to caution [499] you. Within limitations, I let lawyers conduct their own cross-examination, but when they pass the realms of reality and get into the world of fantasy, you may be imposing an obligation on me. When you tell me or when you ask a witness that he lied because he told his opponent something in a political campaign, you have passed reality. That isn't the way the real world acts.

If you are seeking to blacken his character, you may require me to give an instruction to the jury that this is simply not justification for libel. So all I'm telling you, Mr. Creighton, is be careful, because I know the real world. I have been in politics and I suspect so have

you. You don't really believe that what he did is anything unusual, because it isn't.

* * *

[504] Q. Your first contact with Alice and Patty Stephens would have occurred on the seventeenth, correct?

A. That's correct.

Q. When you sat down at that meeting and heard all that the two women had to say, did you believe both of them?

A. Yes, I think I did.

Q. There was no reason to believe Patty more than Alice or Alice—excuse me, Patty Stephens more than Alice Thompson or Alice Thompson more than Patty Stephens, was there?

A. I didn't have any immediate reason to believe one more than the other, no, I didn't.

Q. As I understand your testimony on direct, you asked both of them to submit to a lie detector test, but only Patty ended up taking it, is that correct?

A. It was understood or planned that both of them were and only one of them did.

Q. So we are very clear on this point, the lie detector test given to Patty Stephens has nothing to do with the statements that Alice Thompson made and were printed by the newspaper on November first, correct, they were not— [505] she was not being quizzed about her testimony in this court?

A. About her Billy New allegation and her own personal involvement, is that what you mean?

Q. No, she said in this courtroom that her sister lied to the Journal News, but that wasn't the subject matter of the lie detector test given to Patty Stephens?

A. Oh no, right. I thought you said Alice Thompson before when you said she had testified or something.

Q. I'm sorry if I confused you.

A. I understand what you are saying.

Q. You agree, don't you, that the meeting lasted from approximately twelve-thirty to four-thirty?

A. Yeah, close approximation.

Q. You agree that the tapes are two hours and twenty-five minutes?

A. You have represented that to be that and if that's what it is, I assume that's correct. I've not timed them exactly and I assume that what you represented to the Court is exactly right.

Q. Well, I timed it and I do represent that it was two hours and twenty-five minutes.

A. Sure.

Q. So there's an hour and thirty-five minutes not on the tape, the tapes I should say?

A. Appears to be the case.

[509] Q. You filed a complaint through your attorneys in this action in first State Court and then Federal Court and the State Court filing was, I believe, late December of 1983, correct?

A. That's right.

Q. You read that complaint before it was filed, didn't you?

A. Yes.

Q. As a matter of fact, you went out to Patty Stephens' home and showed it to her or talked about it with her, didn't you?

A. I had a rough copy of it when we went to her home.

Q. Everything that was said in that complaint was accurate, wasn't it?

A. Yes.

Q. You authorized the filing of the complaint?

A. Yes, I did.

Q. In the complaint says that the interview was recorded in its entirety by use of two separate recording

devices. That's not really true, is it? It wasn't recorded in its entirety?

A. I dispute your answering your own question. I [510] say that it is in its entirety. The interview was.

Q. Please explain, Mr. Connaughton.

A. I say the interview is recorded in its entirety.

Q. The tapes were turned on and off a few times during the taping on September 17, weren't they?

A. That's right.

Q. Did you ever make any statements while the tapes were turned off?

A. Well, that's about an impossible question to answer, except for me to say that I'm sure that I said something to somebody. I just wouldn't have sat there like a statue. If that's your question, if your import is did I say anything about the other parts, no. I've testified before what I said.

[512] Q. Isn't it a fact that during the evening of the seventeenth, you told the people present in the room that if they heard the tapes, New and Dolan heard the tapes, they'd probably resign?

A. I can't say that's an exact quote. I testified on direct examination that I know I said at one point, "I can't believe what I'm hearing," and "Can you imagine what these guys would do if they heard these tapes?" Something along those lines.

Q. That's exactly what you responded to the questions of the reporter and the editor on your—

THE COURT: Are you referring to the transcript, Mr. Creighton?

MR. CREIGHTON: Yes.

THE COURT: I think he's entitled to know what you are referring to. Identify the page, please.

MR. LLOYD: May I approach?

[513] At Side Bar:

MR. LLOYD: So that I don't have to do this every time, would your Honor instruct counsel whenever he's

interrogating this witness about something that's on that transcript of his discussion with Jim Blount and Pam Long, he identify it so he can refer, so I don't have to keep doing this?

THE COURT: Mr. Creighton, I think that's reasonable.

MR. CREIGHTON: Yes, your Honor.

THE COURT: If it's not a transcribed interview, you are not under that obligation, but I don't think it's fair for you to know exactly what the person said, and for him to try to remember verbatim. I think Mr. Lloyd's request is reasonable. If you are going to refer to that, identify the page.

MR. LLOYD: Or the deposition, would you include that?

THE COURT: Deposition is obvious. Okay.
Before the Jury:

By Mr. Creighton:

Q. Mr. Connaughton, please turn to page thirteen of the transcript of your interview with the Journal News, midway in the page, isn't it a fact, sir, that you were asked a question that was stated this way. "As far as the [514] resignation, though," and your answer was, "Well—

A. Excuse me, I have the wrong one here. What exhibit?

Q. Exhibit I, page thirteen.

A. I have it.

Q. Didn't you respond to that question, "Well, I probably would have put an add on and said. You know, God damn, after they hear this, they ought to just resign and quit or something, you know, in that kind of a setting and expression." Are those your words, sir?

A. This has been accurately recorded, so yes, they are. Those are the words that I spoke to the Journal News at that time.

. . . .

[524] Q. Mr. Connaughton, the article that you were complaining about in this lawsuit of November 1, 1983, in the article the claims of Alice Thompson are printed, is that correct, sir, published?

A. That's correct.

Q. Your denials of her claims are published, aren't they?

A. In different fashions, yes, they are.

Q. But your denials that you made are accurately quoted and published in that article?

A. I believe they are accurately quoted and published, although taken out of context, yes.

Q. You had a second opportunity to give denials on her claims on November third at your home when you held a press conference, is that correct?

A. I don't know if I would characterize it as that being a second opportunity to make denials of her claim but I had a press conference.

Q. And the Journal News covered that press conference, didn't they?

A. They did.

[525] Q. They published an article with your picture on it on the right-hand side, first page of the second section of the newspaper, isn't that correct?

A. I'm not positive of the location, but they certainly did, my picture and there was an article.

Q. And your denials of Alice Thompson's claims were covered in that article, weren't they, sir?

A. Not in a fashion that I took her claims and denied them. I made an overview statement of the situation as I perceived it to be and why I thought this was coming about, but I did not take her claims and then deny them in a separate press conference.

Q. Your statements from that press conference, however, were accurately reported by the Journal News, weren't they?

A. Yes, sir.

Q. Now, sir, would you take the transcript. Defendant's Exhibit I in hand, please? First of all, turn to pages thirteen and fourteen. Are you there, sir?

A. Yes, I am.

Q. Mr. Lloyd inquired about this. I don't mean to be repetitive, but you told the Journal News in response to a question about whether you could understand why—excuse me—Alice Thompson was upset." You said, "I imagine she feels betrayed."

[526] A. That's what I stated.

Q. You then went on to say that, "She probably felt that my representation, that maybe she could remain anonymous had been a breach of trust to her," didn't you, sir?

A. That's what that says.

Q. Isn't betrayal or breach of trust like a trick?

A. Is a betrayal or breach of trust like a trick?

Q. Yes, sir. Is that a trick? To betray someone?

A. If you had in fact represented something to someone, or if you had in fact had made a trust arrangement or a truth agreement with someone and you had breached that, that would be a trick.

Q. But it's your word, betrayed, wasn't it, not the Journal News' and not Alice Thompson's?

A. Mr. Creighton, what you have to understand is the Journal News, by the context of their question, they were asking me, as they did in other areas throughout this interview, to project myself into why she would be saying those things. They said why would she say this or why would she say that. I was projecting what I thought her reasoning was.

Q. You were being honest, weren't you?

A. As to what I thought she was thinking, yes, I sure was.

Q. You said, "I imagine she feels betrayed," your [527] words?

A. That's what I said.

Q. "Breach of trust" was your phrase?

A. Well, taken in the context that maybe she could remain anonymous had been a breach of trust to her. With that admonition, as I previously stated, insofar as I had control of the situation, I would have tried to have done it.

Q. Would you turn to page seventeen, sir? On page seventeen of that interview and asking about a post-election trip, you stated that there was a discussion that you can recall about maybe they could go down to Hilton Head. I'm referring to about sixty percent of the way down in that transcript, sir, that they could go down to Hilton Head or Florida or something like that or maybe hideout or something like that. Isn't that what you said to the Journal News?

A. Yes, and the rest of that sentence is, I don't know, but I own no property and have nothing to offer them.

Q. But you admit that there may have been a discussion, you kind of remember a discussion about two things, Hilton Head and Florida?

A. I do, what I said was what's in here. I do remember offhand being discussed, something like they ought to or could go down to Hilton Head or Florida or something.

Q. None of this is on the tapes of September 17?

A. I told you when that occurred before after the [528] interview was completed and they had questions about their personal safety and what to do and in the event that they were getting a lot of heat from people and I suggested to them that they could get police protection or things got real hot, maybe they could go south or go someplace. I don't know if I positively said these words as I stated in here.

Q. You were being honest with the Journal News in giving your best recollection which was only a few weeks after the event at that time, wasn't it, sir?

A. I was, particularly in the context when they had suggested two or three or four times, they keep humming

this thing about taking them with my family to Florida, which I can't even understand why they are asking such a preposterous question to begin with. So I'm searching and reaching, saying, what in the world are they driving at here. I don't even know what they are doing. So I said maybe I did say Florida or go south if they got scared. Certainly had nothing to do with going on vacation and nothing to do with going with my family, ever.

Q. Thank you, sir. Would you turn to the page?

The question concerned itself with offers to set up these two women, Patty Stephens and Alice Thompson in jobs. This continued from page fourteen where you had denied at the top of fifteen, absolutely not, and the question was, "Why would she say this to us?" Isn't it true that your response [529] was, "What was discussed in an offhanded way, the people who owned that bar who we are not very pleased with, their lease expires next September. My wife has the idea that she wants to open an ice cream type shop like Graeter's or some such thing as that. And I heard her discussion with them that maybe since Patty had run this Homette Restaurant or something of that nature, that maybe she would help out and participate in the operation of this, whatever you want to call it, deli-shop or gourmet ice cream shop. Yes, and I was present when that took place."

Do you recall giving that answer, sir?

A. Yes, I do.

Q. Then further, skip a question, then the question was put to you, "But that would be only for Patty," and then it was unintelligible. Your response was, "I guess Alice was there. And the offer may have been extended to her in that fashion, that she could work there or something. I wouldn't be surprised if that was said." Those are your words, aren't they, sir?

A. Yes.

Q. Is there anything different about the definition of the word "offer" that you used yourself in the statement to the Journal News on October 31, 1983, than the offer

that's described November 1, 1983 in the Journal News article?

[530] A. Oh, yes, there's a whole bunch of difference.

Q. The definition of "offer" changed, didn't it?

A. No, it didn't, didn't change at all.

THE COURT: Wait, you are entitled to finish your answer. Did you finish your answer?

THE WITNESS: No.

THE COURT: Feel free, answer the question as you wish.

THE WITNESS: Well, if you will recall what my answer was, says, "I guess Alice was there. The offer may have been extended to her in that fashion that she could work there. I wouldn't be surprised if that was said." I didn't hear it. They were asking me could that have been said. May it have been extended? Could this, could that? I don't know. It wasn't in my presence. Never heard it said.

MR. CREIGHTON: I have no further questions.

THE COURT: Mr. Lloyd, do you have redirect?

MR. LLOYD: Just—

THE COURT: One moment, Mr. Irwin wants to talk to you for a second.

MR. IRWIN: Thank you, Judge.

THE COURT: No problem.

THE COURT: Mr. Lloyd, it may be that defendant is not finished.

MR. CREIGHTON: Your Honor, may I have two or [531] three more questions?

THE COURT: Yes.

Q. I apologize. Turn to page thirteen of that transcript.

Down at the bottom, the question was directly put to you as follows. "Did you ever promise Alice Thompson anonymity?" Your response was, "That question was discussed and I was hoping to and I told her it would be my intention and hope that she could remain anonymous, yes, but did I promise her anonymity, the answer would

be no. Did we discuss it, we sure did. I expressed to her my desire as well as her desire that she could remain anonymous."

My question is first that is accurately read, isn't it?

A. Yes, it is.

* * *

[836] Q. Now, sir, did you at any time on the thirty-first of October, 1983 tell Miss Long, Mr. Blount or anybody else at the Journal News that you would try to get Patty Stephens to come in and talk to them?

A. Not at all. That subject matter never arose at any time. When the taped interview was going on or after it was off. The subject matter of any discussion after they completed my interview was the tapes themselves, which I knew that David Berry, my brother-in-law had in the next room. When we came out of the room together, he was just finishing up with Laurell Campbell in the next room. We met there, I advised him that I had told the Journal News that I was willing to turn over the tapes and to go ahead and let me have them, which he did and he rewound and took them and gave them to Mr. Blount. But no one ever mentioned Patty Stephens [837] and I don't know where that idea came from about that I was supposed to contact here. That's absolutely not true.

* * *

[TESTIMONY OF LESLIE SPILLANE]

* * *

[538] Q. Would you please state your name?

A. Leslie Spillane.

Q. What is your occupation?

A. I'm an attorney. I'm also an area court judge.

Q. For the jury's benefit could you explain what an area court judge is?

A. An area court judge is a part-time position in which you preside over a court having basically the same jurisdiction as a Municipal Court, but in the areas.

Q. For what jurisdiction are you a judge?

A. Area one, which is in Oxford, Ohio.

Q. Could you tell us in the summer of 1983, did you have occasion to speak with Mr. Connaughton and a Mr. Matthew Crehan regarding Mr. Connaughton's campaign for Hamilton municipal judge?

A. Yes, I did.

Q. Could you tell us when exactly, if you recall, [539] that conversation occurred?

A. I recall that it was in the month of July, but I don't recall the specific date.

Q. Can you tell me what prompted that discussion with Mr. Connaughton?

A. Dan Connaughton and Matt Crehan and I were talking about Dan's candidacy basically.

Q. Could you tell us what was the substance of that conversation?

A. Well, the substance was pretty much that Matt Crehan and I were trying to talk Dan out of running for that position.

Q. Why is that?

A. Well, I didn't feel that he stood a good chance to win. That he probably did have a good chance to inherit that job if he didn't run at this time, so I thought it made a whole lot more sense for him not to run.

Q. What was Dan's reaction?

A. He was adamant about running.

[540] Q. What was Dan's reaction to that suggestion?

A. He was adamant about running.

Q. And what else was discussed during that conversation?

A. During that conversation, Dan indicated to me and to Matt that he had information relating to Billy New who was the clerk of courts in Municipal Court and that that information was going to be sufficient to basically win him the election which would destroy Billy New and with him Judge Dolan.

Q. How did he characterize, if at all, the strength of his information?

A. We questioned him about that and while he didn't tell us what it was he did say that it was indictable.

Q. Did he use that word?

A. He used the word indictable.

Q. Would you characterize that as an offhand or flippant remark by Mr. Connaughton?

MR. LLOYD: Objection.

THE COURT: Overruled.

A. He was not being flippant.

Q. What was his emotional state when he said that?

A. Dan was adamant. He was talking strongly. He would not be dissuaded, angry.

Q. Did you get the impression in anyway that he was [541] kidding when he said that?

A. I did not think he was kidding.

* * * * *

[TESTIMONY OF JOHN HOLCOMB]

* * * * *

[643] Q. Are you acquainted with Dan Connaughton?

A. Yes.

Q. The plaintiff here?

A. Very well.

Q. Do you have any animosity or ill feelings about either Judge Dolan or Dan Connaughton?

A. None whatever.

Q. You've talked with me prior to coming in to the courtroom today, haven't you, sir, you've talked to me?

A. Yeah, last Wednesday, I think.

Q. Have you also talked with Mr. Lloyd?

A. I think I talked to him on one occasion too.

Q. You've talked to Mr. Connaughton about the case?

A. Yes, I have.

Q. Mr. Holcomb, inviting your attention to the political campaign between Judge Dolan and Mr. Connaughton, do you recall that Dan Connaughton had filed a com-

plaint against Billy New, Judge Dolan's administrative aid?

A. He caused—depends what you call a complaint. He caused the police department to start an investigation.

Q. Do you recall that a criminal case against Billy New was being handled by you and ready to present to the Grand Jury about ten days before the election in 1983?

A. Yes.

[644] Q. Do you recall reading the November 1, 1983 article in the Journal News about Alice Thompson's claims and Dan Connaughton's responses to the Billy New case or concerning the Billy New case?

A. I'm sure I read it.

Q. Mr. Clerk, does the witness have Joint Exhibit I? Mr. Holcomb, taking a second, that is the November one, 1983 article that I've referred to and I'll ask you again, have you read it? Did you read it at the time, first of all?

A. I'm sure I read it at the time.

Q. Sir, do you remember—

A. I haven't read it since.

Q. Do you remember a conference between you and Jim Blount at the Journal News several days prior to the article that you were just handed?

A. Yes, sir.

Q. Tell us what you recall about that conference.

A. As I recall, Mr. Blount called me up at my office and he said, "Can I see you for a minute?" I said, "Sure, come on over." He came over and then I remember that he acted like he was in a hurry, and that he was perspiring kind of profusely and I noticed that because I have that same problem and you notice that with people. But anyway, he walked through the door and he said, "John, I'm working on something and I don't want to get my tits in the wringer and [645] I want to check with you

on some people." I said, "Who?" He said, "I want to check with you to see if you think that Patty Stephens and Alice Thompson." and he named two or three other people, ". . . were believable people."

I said, "Yes, I think they are under these circumstances," and I said, "Sit down here." I sat him down and I gave him the statements that these people had given the police department, and, you know, I said, "This is off the record, you understand." He said, "Oh, yeah, that's the way I want it." But anyway, I showed him these statements that these people had given the police, typed statements, and he looked those over and I guess that was the gist of it.

We had some other conversation, I think that—I think he may have said something like that I was probably going to be caught in the middle of it some way. I said, "How do you figure that?" He said, "Well, you know, no matter what you do, it's going to be wrong if you prosecute the guy, then half the people are going to say, you know it's a witch hunt. If you don't prosecute him, the other half will say you let him go."

Q. Mr. Holcomb, let me ask you this. Do you remember Mr. Blount specifically inquiring about Alice Thompson's credibility, as to whether she was credible and believable?

A. Yeah, he inquired as to each.

Q. What did you tell him about Alice Thompson?

[646] A. I told him that, in my opinion, she was credible based on what I had. I may have told him she was the more credible of the ones that I had.

Q. If you had said that, as you may recall now, what would have been the basis of saying that she was the more credible of the people involved?

A. Well, because like in many criminal investigation a lot of the witnesses and a lot of the people involved have records. These people did too. They were no exception. They weren't what you would, I guess, call the

cream of the crop, but anyway, to answer your question, what she had told me, as I recall, I was able to verify independently through other people.

Q. Did Patty Stephens' claims that she made to the police check out in the same fashion?

A. Yes, they did. She made a lot more claims though, as I recall. Alice Thompson made one claim, one thing about, I have it all in here. I haven't looked at it that much. I would have to refresh my recollection. But as I recall, she said Alice Thompson told about one specific instance in which she was involved, maybe for shoplifting or something like that and about money that she paid. I was able to verify that independently through other people and also through the cash register tapes or what they call the case jackets in the Hamilton Police Department, which is [647] information that the Hamilton police detectives got for me. Now, so that was one claim that she made, which I felt was corroborated.

Now, the other woman, Patty Stephens, made a great many claims. Some of them were corroborated and, in fact, the defendant was indicted on some of the claims that she made and pled guilty to them too. So, to that extent, she was a credible person and I felt that she was, but she made other claims and had other ideas that were not in my opinion and, well, some of them I know were incredible.

Q. Did Patty Stephens in her interview with the prosecuting authorities indicate that Judge Dolan was personally aware of what was going on?

A. Yes, she did.

Q. Did that check out?

A. No, there was never any evidence of that, any corroborating evidence of that.

Q. Did Jim Blount ask you about the all night—excuse me, the tapes of the all night meeting at Connaughton's home. Do you remember him asking you?

A. I think he asked me if I heard them and I told him that I had not heard them. I did have them in my

possession at one time, but I sent them to the police department. Or at least they got to the police department some way. Finally, they did come back to my possession from [648] the police department as I recall. To answer your question, I told him that I had not listened to the tapes.

Q. Did Alice Thompson and Patty Stephens testify before the Grand Jury?

A. I'm not going to answer that unless I'm directed to.

THE COURT: I'll not direct you to answer anything. It's your choice.

THE WITNESS: See, because of the privacy of the Grand Jury, I really don't know if I should, Your Honor.

THE COURT: I understand. This is a civil matter and I'm not going to require you to do that.

Q. Let me ask it this way. Were they called to testify before the Grand Jury, subpoenaed?

A. Yeah.

Q. Was Judge Dolan called to testify before the Grand Jury?

A. Yes.

Q. Was Dan Connaughton called to testify before the Grand Jury?

A. Yes.

Q. Did the Grand Jury indict Billy New?

A. Yes.

Q. Do you recall approximately when that indictment was returned?

[649] A. I could tell you approximately like, you know, like November second or third or something like that.

Q. Did the Grand Jury take any official action against Judge Dolan or against any other employee of Judge Dolan's court?

A. No.

Q. Is Judge Dolan still the sitting judge in the Hamilton Municipal Court?

A. Yes.

Q. When the Grand Jury reported, did you issue a statement concerning the Grand Jury's findings?

A. Yes.

Q. Would you tell us what you said in that statement, summarize it for us?

A. It would be a general summary, because I really don't recall it all that well. As I recall, since this thing happened right at the election time, I took extra pains to try to be fair and impartial to Mr. Connaughton and Judge Dolan. You have to understand what the atmosphere in downtown Hamilton was at that time. I don't know how it was, you know, but around the courthouse, you know you had the Dolan camp and you had the Connaughton camp and the Connaughton camp said things about Dolan and the Dolan camp was saying things about Connaughton. So anyway, I told the press when the Grand Jury report was issued that there was no [650] evidence of any illegal inducements given by Mr. Connaughton to anyone for any reason and there was no evidence of any criminal conduct on the part of Judge Dolan or anybody in the Municipal Court system, other than Mr. New.

Q. Do you recall, sir, whether the Journal News published the substance of that statement that you gave?

A. Yes.

Q. Mr. Holcomb, you've read the November 1, 1983 article, at least you read it at the time. Are you familiar with its contents, generally?

A. I can't say that I am. I'm looking at it here, I guess, but—

Q. Would you take a minute, sir, and briefly glance over the article?

MR. CREIGHTON: Your Honor, may be have enough time to read it?

THE COURT: He may do so.

A. You don't have a pair of glasses on you, do you?

THE COURT: I will be happy to lend you mine.

A. I've looked it over.

Q. Thank you, Mr. Holcomb. Going back to November of 1983, when you read it, did you at that time take any official action against Mr. Connaughton or launch any investigation of Mr. Connaughton, or as a result of the publication of that article, the claims reported that Alice [651] Thompson had made?

A. Why, no, I would never take any action against anybody because of what's in the paper.

Q. In reading that again now, and then recollecting to your mind the reading that you gave it back in November of 1983, in your opinion, as a prosecutor for twenty-one years, is there anything in that article of November 1983 which charges Dan Connaughton with a crime?

A. Not that I recall.

Q. What about the claim by Alice Thompson that jobs and trips were offered as reported in the article; is that a crime, sir?

MR. LLOYD: Your Honor, I respect this witness, but I don't think his testimony is proper here.

THE COURT: It may well be. Objection overruled.

A. Would you repeat that, please?

Q. What about the claims by Alice Thompson that jobs and trips were offered as reported in that article? Does the fact that those jobs and trips were offered by Mr. Connaughton indicate the commission of a crime?

A. Not standing alone, no, sir, wouldn't indicate anything.

Q. Do you and other police authorities ever offer benefits to people who give you information?

[652] A. What do you mean by that?

Q. Is there a specific fund for the paying of informants to bring forth information to the prosecuting authorities and the police?

A. Yes, especially the police, not so much me. Police agencies have those funds, FBI has them, U.S. Attorney has them. Prosecuting attorney has them.

Q. You have them at your discretion, sir?

A. Yes, sir.

Q. Is there anything illegal about offering a benefit to someone to cooperate and tell you the truth?

A. Not in my opinion, no, sir. That's what they are for.

MR. CREIGHTON: Your Honor, I have no further questions of this witness at this time.

THE COURT: Mr. Lloyd, do you wish to inquire?

MR. LLOYD: Yes, your Honor.

CROSS-EXAMINATION

By Mr. Lloyd:

Q. Mr. Holcomb, when Mr. Blount came to see you and asked you about the credibility of Miss Thompson and Miss Stephens, did he tell you anything about Dan Connaughton?

A. No, sir.

Q. Did he ask you whether you had heard that Alice Thompson had accused Dan Connaughton of offering her and her [653] sister jobs or trips or anything else?

A. No, sir.

Q. So I take it he didn't ask you who you would believe if Dan Connaughton's word was pitted against Alice Thompson's?

A. No, sir.

Q. Now, did Mr. Connaughton come to you and ask your advice as to what he should do with information he had obtained?

A. Yes, sir.

Q. You remember when that was?

A. Yes, sir.

Q. Would you tell us, please?

A. September 16, 1983.

Q. What did he ask you?

A. I forget what day of the week it was on, Thursday or Friday. I had just finished some motions in a murder

case that happened near Monroe, but anyway I remember coming back to my office and there's the Connaughton family. I thought, "Oh, no, this is just what I need to wind up the week." But anyway, I took them back into my office, because we are all friends and have been for a long time. Then Dan and his wife and his brother-in-law started to tell me, simultaneously almost, about some, what they thought, were improprieties in the Hamilton Municipal Court system.

[654] Q. Did Mr. Connaughton say that he had any tapes of statements made by either Miss Stephens or Miss Thompson?

A. Well, to tell you the truth, the first time that they came in, I don't think he did. Then he came in a later time—I'm not clear on this—but I know he came in at a later time and he had tapes with him.

Q. Why, that's what I meant to ask you about. That conversation.

A. Yeah, he had tapes with him the second time.

Q. Did he ask you what he should do?

A. Well, yes, I asked him what he wanted me to do and he said he thought it was a proper matter to take directly to the Grand Jury of Butler County. I told him that I didn't think that that was a very good idea, because he had previously worked as an assistant prosecutor for me for like four years or something like that, and although Dan and I aren't what you would call real close personal friends, I mean we don't, you know, fraternize together or anything—he was coaching my son's little league baseball team for three years and my thirteen year old son and his thirteen year old son are the best of friends. So I said under these circumstances, you know, this is bad news to bring this to me and to ask me to take something directly to the Grand Jury. Why don't we just handle it like any other case, like any other citizen and you go on down to the police station and [655] tell them that—start a complaint and work it up.

Q. Did he follow your advice?

A. Yeah, he followed my advice but not right away. As I recall, maybe a week elapsed or something like that. I recall another thing too—well, maybe you don't want me—

Q. You go ahead.

A. I recall another thing that, you know, I told him that I wouldn't get too excited, you know, about what these people—about what this one woman, this Patty Stephens, he was really excited about her claims. I said I wouldn't get too excited about it and I really wouldn't get worked up about it at all until I ran her on the machine, on the polygraph.

Q. You made that suggestion to him?

A. Yes, sir, I did. Then I recall on September 22, I think he called me on the phone and said he just got the results back of the polygraph examination.

Q. After that, did you advise him to go forward with the complaint?

A. Yes, shortly after that, or again, some time elapsed. Times elapsed in here. I didn't know what the guy was waiting for, but I didn't know what was going on either. But I think toward the end of the month, I think he filed a complaint with the police department or caused them to start their investigation.

. . . .

[657] Q. So isn't this suggestion here that the Journal News said about Alice Thompson, at least in part, was that she was accusing Dan Connaughton of planning an act that was extortion?

A. Would you repeat that question?

THE COURT: Read the question, please.
(Question read back.)

A. The suggestion by the Journal News?

Q. Well, they quoted, they said that is what she said. I'm not trying to distort anything. I'm just asking you if what is suggested here might not be a crime, if true.

A. Possible.

Q. Now, sir, back to something that Mr. Creighton asked you about. You said, I believe, as I understand you, that it's not necessarily improper to offer witnesses inducements to tell the truth, is that what you said?

A. Yes, sir.

Q. I guess I need to ask you this, sir. As a matter of legal ethics, if a lawyer offers some kind of inducements to witnesses to get them to testify, without regard to what it is they are going to testify to, is that a proper thing for a lawyer to do?

MR. CREIGHTON: Objection.

THE COURT: Overruled.

[658] Q. In your judgment?

THE COURT: You may respond.

A. Sir, I think you have—I think you have to draw a distinction, at least I do, I draw a distinction between offering people something to testify and offering people something for information.

Q. Where the charge is that a lawyer offers jobs or trips to Grand Jury witnesses, is not the implication that he is offering something of value to witnesses in exchange for Grand Jury testimony?

MR. CREIGHTON: Objection.

THE COURT: Objection sustained. Jury is instructed to disregard that question.

Q. Very simply, where a lawyer offers a consideration to a witness in exchange for any kind of testimony, would you say that violates a lawyer's ethics?

THE COURT: I think the witness has answered, Mr. Lloyd. I think he's drawn a distinction between testimony and information. Objection sustained.

MR. LLOYD: May I be heard?

At Side Bar:

MR. LLOYD: He said there's a difference. I'm just trying to get him to say what's unethical. He said there's a difference.

THE COURT: He's not an expert on ethics. [659] He's an expert on law. I think that's all you can get from him.

MR. LLOYD: Can I ask him whether it's legal to offer something in exchange for testimony?

MR. CREIGHTON: He already did answer that.

MR. LLOYD: No, he didn't. Said there was a difference.

THE COURT: Alright, that question you may ask. Before the Jury:

By Mr. Lloyd:

Q. Sir, in your opinion, is it legal for a lawyer to offer a witness some consideration in exchange for testimony?

A. Yes, if it's true and if it's known, I mean it's something to be considered in weighing the credibility, but it's done every day.

* * *

[TESTIMONY OF HENRY MASANA]

* * *

[668] Q. Mr. Masana, at the time that the Grand Jury indicted Mr. New, four days before the election, do you recall whether there was a statement issued by the Prosecuting Attorney's Office clearing Judge Dolan and anyone else connected with the court?

A. That is correct.

Q. Directing your attention, sir, to the, I think it was the first week of October of 1983, did you have occasion to meet or, excuse me, that would be the last week of October, 1983, did you have occasion to meet with Alice Thompson?

A. Yes.

Q. Did you know her before?

A. No.

Q. Would you tell the jury how she came to you and what you did?

[669] A. Some time in the early part of October, I got a call from Matt Crehan, who is an attorney in Hamilton and does the same kind of work that I do. He said that a person that he had represented on one

occasion had called him and wanted to talk to the attorney who was representing Mr. New and she thought that he did. He told her that he did not. He got her phone number and he says that he thought that I was representing Mr. New. In fact he knew that I was representing Mr. New.

He then called me, told me that she was trying to get in touch with the attorney that represented Mr. New and I contacted her, using that phone number and I set up a time when she should come to my office because she was anxious to talk.

Q. Did she talk?

A. She did come, on October thirteenth and I set it up for a definite appointment for her to come and because Mr. Crehan had represented her on a prior occasion, I advised him to come and he did come. The three of us was there and she came to my office and we were in the law library there.

Q. Did you then, subsequent to that meeting with Alice Thompson, set up a meeting with the Journal News for Alice Thompson?

A. Yes, she said—

MR. LLOYD: Objection.

[670] THE COURT: Of course, Mr. Masana, you know better than that. Come on.

A. I did, yes.

Q. Was that at the request Alice Thompson?

A. That was at her request, yes.

Q. Did you in fact set up the meeting?

A. Yes, I did.

Q. How did you do that?

A. I contacted Mr. Blount, who was at the Journal News, whom I know. I went there and I asked him if—that a girl had contacted me and she had said certain things and she said that Mr. Connaughton was using dirty tricks and that she felt she wanted to be interviewed by the paper. I asked Mr. Blount—

. . . .

[674] Q. Okay. You say when you approached Mr. Blount, you told him that Alice said that the dirty tricks were used by Dan Connaughton?

A. That's correct.

Q. That's your phrase?

A. No, no, that's [hers].

Q. You were the one that repeated it to the Journal News?

A. No, she repeated it to the Journal News.

Q. Well, that may be, I'm not arguing with you about that. I'm just trying to get you to verify that that's what you said to the Journal News that she said to you?

A. Let me say this. She said it to me; when I went to the Journal and contacted them, I told them that she said that, and before the interview, she told Mr. Blount that. So that's the sequence of it.

. . . .

[TESTIMONY OF DAVID BERRY]

. . . .

[683] Q. Would you turn to page 187, question 790? Basically, Mr. Berry, aren't you saying that Alice Thompson is not believable?

There was an objection by Mr. Frank at that point.

A. Yeah, I know on the one hand I'm saying Alice is believable in terms of her testimony with regard to Billy New, which she was. I'm saying now Alice Thompson, for whatever reason, managed to construe, fabricate or construct this trip which the Journal News bothered to give full attention to and that's what I'm saying.

Q. Would you go back to page 80, question 354?

About how long did it take then between the time the interview was over and the tape recorders were turned off until the young ladies did leave and were driven home by Joe Cox?

A. I really can't say. I don't know. I think that the Barnes left first, but I really don't know how long they stayed. I don't even remember much about that.

Q. Continuing on the next page, do you have an idea as to whether the Barnes left pretty much right away?

A. I think they probably stayed around for fifteen [684] minutes or so again.

Q. Then do you have a general recollection that after the Barnes left, someone else left?

A. No. The only persons that left were Cox, myself, Martha and Dan and the two girls.

Q. So it would have been then Joe Cox leaving with the two young women sometime thereafter?

A. Right.

Q. Turn to page 84, question 380. In the presence of either Alice Thompson or Patty Stephens, about going south, Florida, condos or Hilton Head—

A. No, I wouldn't be able to say that.

MR. LLOYD: That's not a full sentence.

THE COURT: I'm sorry.

MR. LLOYD: That's not a full question. What was read was not a full question.

THE COURT: Excuse me. Mr. Creighton, you are reading the complete question, I presume.

MR. CREIGHTON: Complete question as reported here.

THE COURT: Read it again, if you will.

MR. CREIGHTON: I'm sorry, Your Honor. Perhaps if I read one or two above it and come down.

Question 378, Is it your recollection, Mr. Berry that at no time did you ever hear any comments, discussions, [685] remarks, even in jest, about—

A. In the presence of the women?

Q. Well, let's break it down.

A. Alright.

Q. In the presence of either Alice Thompson or Patty Stephens about going south, Florida, condos or Hilton Head?

A. No, I wouldn't be able to say that.

Q. Alright. Was there discussion outside their presence of members of the committee going?

A. Sure.

Q. Could you tell us what that was?

A. Well, I don't even know when this all took place.

MR. CREIGHTON: There was an objection. He continued.

A. At one point in time I think Martha and Dan indicated that Bob and Patty Love had offered the use of their home in Hilton Head free of charge which I thought was very generous and nice and we did arrange, in fact, did go to Hilton Head after the election was over with for a vacation.

. . . .

[693] Q. Turn to page 49, please, question 219. Do you recall anything that Dan Connaughton said to Alice Thompson in your presence or that you might have said to Alice in Dan's presence concerning anonymity, like we'll try to shield you like a lawyer would any client or protect you or keep you out of this?

A. I can't recall a specific quote. I can tell you that—I can tell you that in thought, deed and action, that would have been the basis of our—or the perspective and as I said before, only because of concern for her psychological vulnerability, as well as the personal risk she may have been encumbering.

. . . .

[TESTIMONY OF ALICE THOMPSON]

. . . .

[725] Q. Would you state your name for the record, please?

A. Alice Thompson.

Q. Miss Thompson, would you please take the microphone, bend it toward your face and speak in the microphone? It's very difficult to hear in this room. State your address, please.

A. 1194 Shuler Avenue.

- Q. Are you the sister of Patty Stephens?
- A. Yes, I am.
- Q. Who is your mother?
- A. Zella McQueen.
- Q. Miss Thompson, would you relate to the jury your [726] record in Municipal Court in Hamilton, please?
- A. One's for assault and another charge for petty theft.
- Q. Those were convictions, ma'am?
- A. Yes.
- Q. When you met with the Journal News, excuse me, did you meet with the Journal News on or about October 27, 1983, for the purpose of being interviewed by Journal News personnel?
- A. Yes, I was.
- Q. Do you recall that that meeting was in the law office of attorney, Henry Masana?
- A. Yes, it was.
- Q. Was that meeting where you were interviewed voluntary on your part?
- A. Yes.
- Q. Who requested the interview in the first place?
- A. I did.
- Q. What was the purpose of requesting that interview?
- A. I wanted to let the people know in the first place that I wasn't a snitch. You know, that I didn't go forward, that they approached me. I wanted to let them know about the dirty tricks that Dan Connaughton was up to.
- Q. When you say Dan Connaughton, you mean the [727] plaintiff, Dan Connaughton?
- A. Connaughton, excuse me. I have a problem pronouncing the name. Also, I wanted to let them know how he tricked me into letting people hear the tapes. They promised nobody would hear except for Dolan and Billy New.

- Q. Were you present at the meeting—at a meeting, all night meeting, very early morning hours of September 17, 1983 at the Connaughton home?
- A. Yes, I was.
- Q. Mr. Deputy Clerk, would you please bring up the Joint Exhibit I, the November one article that's in two pieces?
- MR. CREIGHTON: Your Honor, may I have permission to approach the easel?
- THE COURT: You may, of course.
- Q. Miss Thompson, can you see the exhibit displayed on the easel?
- A. Not clearly.
- THE COURT: Do you want to step down?
- Q. I want to ask you a series of questions concerning what is displayed on the easel. First of all, do you recognize what is on the easel as a copy of an article which was published by the Journal News?
- A. Yes.
- Q. The headline reads, "Bribery Case Witness Claims [728] Jobs, Trips Offered." Were you at the time a bribery case witness?
- A. Yes, I was.
- MR. LLOYD: Objection.
- THE COURT: I'm sorry.
- MR. LLOYD: Objection to that. Calls for legal conclusion.
- THE COURT: If you wish to come to the bench.
- At Side Bar:
- THE COURT: I'm not sure I understand the objection.
- MR. LLOYD: Calls for legal conclusion. He asked her, "Were you a bribery case witness?" It called for her to conclude that it was a bribery case. Calls for her to understand the law.
- THE COURT: Come on, there's no question that she appeared before the Grand Jury, is there? The man was charged with bribery.

MR. LLOYD: She doesn't know what a bribery case is.

THE COURT: Objection overruled:

Before the Jury:

THE COURT: Objection overruled.

MR. CREIGHTON: Miss Court Reporter, I do not know whether that answer was stated or—

[729] (Question and answer read back.)

Q. Now in the first paragraph of this article, and I'm going to summarize so I don't have to read the whole thing, it basically states, that Dan Connaughton offered you and your sister jobs and a trip to Florida in appreciation for your help, you and your sister's help. Does that paragraph accurately state what you told the Journal News in the interview of October 27, 1983?

A. Yes, it does.

Q. Continuing, it states that you were scheduled to testify before the Grand Jury in the Billy Joe New case. Is that also something that you told the Journal News?

A. Yes.

Q. Is that accurate that you did in fact testify in the Grand Jury proceeding?

A. Yes.

Q. The third paragraph it says that you believed that Dan Connaughton used dirty tricks in obtaining your cooperation with his personal investigation. Did you tell the Journal News that?

A. Yes, I did.

Q. Is that the truth?

A. Yes.

Q. Moving to the second column, states that you were interviewed by the Journal News with the understanding that [730] you would not discuss your Grand Jury testimony, in other words, your involvement with Billy Joe New, is that correct?

A. Yes, it was.

Q. Did the Journal News seek to question you on that matter?

A. No.

Q. Then there is a paragraph with two points in it, one and two where it explains why you wanted to talk to the Journal News. First point, to let the people know that you did not snitch. Did you tell the Journal News that?

A. Yes, I did.

Q. Was it true?

A. Yes.

Q. The second point was to reveal the dirty tricks that Connaughton pulled to get her to make a statement. Did you tell the Journal News that?

A. Yes, I did.

Q. Is it true?

A. Yes.

Q. Then goes on to say that you had two other things that bothered you about Connaughton's actions. One, he did not protect your anonymity. Did you tell the Journal News that he had promised to protect your anonymity?

A. Yes.

Q. Were you upset, did you tell the Journal News [731] that you were upset that he did not?

A. Yes.

Q. Number two, he allowed other people to hear tapes of a session. Connaughton and his supporters, of the September 17th meeting I believe that refers to, is that correct?

A. Yes, it is.

Q. Did you tell the Journal News that you were annoyed about him allowing others to hear the tapes?

A. Yes.

Q. Would you tell the jury why you were upset?

A. He promised the night that we went into his house to make the tape, I mean for the meeting, he had these tape recorders getting ready to go on. I asked him what he was up to. He said, "Don't be worried." He said,

"There's nobody else in the room's going to hear the tapes except Billy and Dolan." I said, "What are you talking about?" He said, "Nobody else is going to know your name is involved."

I told him right off the bat I didn't want to go to court or be drug into anything. He said that nobody would hear the tapes except for Judge Dolan and Billy New, that he was going to play them in front of them, show him the evidence he had on them to get them to resign. He would step from the bench, Dolan would step down and then nothing else would be said about it.

[732] Q. I'm going to switch positions, because I want to go to something in the end of the article. Calling your attention to the, I believe it's the fifth column on the second page of this blow-up of the article. Says, Thompson claimed Connaughton had told you that the tapes were to be presented to Dolan. That's Judge Dolan, correct?

A. Yes, it is.

Q. Did you tell the Journal News that?

A. Yes.

Q. Is that true?

A. Uh-huh.

Q. Further, that you told the Journal News that when Dolan did not resign and New was fired, Connaughton became upset and said he was going to file charges. Did you tell the Journal News that?

A. Yes, I did.

Q. Was it true?

A. Yes.

Q. Finally, Thompson said she was angry about the prospect of charges being filed and she said she asked Connaughton for immunity. Did you tell the Journal News that?

A. Yes, I did.

Q. Is that true?

A. Yes.

[733] Q. Was it your impression and did you convey that impression to the Journal News to the effect as stated here in the fifth column that Dan Connaughton hoped to get New and Dolan to resign by playing the tapes to them?

A. Yes, that's what he said.

Q. Is that what you told the Journal News?

A. Yes.

Q. To the best of your recollection, is that what was said by Mr. Connaughton?

A. Yes.

Q. You may resume your seat, please.

Do you recall a discussion at any of the three meetings and a couple telephone calls, excuse me—there was one more point on the article. It states in the article on the first page of it, which now is on the lower side, that you told the Journal News there were three meetings and two telephone calls.

A. Yes.

Q. Is that true?

A. Yes.

Q. At any time during those three meetings and the two telephone calls, did you partake, take part in a discussion wherein the subject of jobs and a restaurant in the place of Walt's Chambers was discussed?

A. Yes.

[734] Q. During those conversations did you learn that a lease on Walt's Chambers, the bar in Mr. Connaughton's building was going to expire?

A. Yes, I did.

Q. From whom did you learn that information?

A. Dan Connaughton.

Q. Turning your attention back to September seventeenth, tell the jury where you went after the meeting.

A. Went home.

Q. Where is home?

A. 1757 Shuler Avenue. It was my mother's home.

Q. Was your mother there?

A. Yes, she was.

Q. Did you have a conversation with your mother upon arriving home?

A. Yes.

Q. Was that immediately upon arriving home?

A. Yes.

Q. Did your sister, Patty Stephens, participate in a discussion with your mother immediately upon arriving home?

A. Yes.

Q. What did you and Patty Stephens tell your mother?

A. We was talking about Dan and Martha's home, what a nice home it was and we also told her, well, Patsy asked Mom if she would keep the kids.

[735] MR. LLOYD: Objection.

THE COURT: Objection sustained.

Q. Miss Thompson, you may not testify as to what your sister said in the conversation, merely what you said.

A. Well, we was talking. We was excited. I was excited, thought we was going to get a trip to Florida. Also told Mom that we was going to get good jobs and we would be taken care of, that we was finally going to get to go somewhere. Get somewhere in life. These people was really going to help us.

MR. CREIGHTON: Your Honor, may we approach the bench?

THE COURT: You may.

At Side Bar:

MR. CREIGHTON: Your Honor, on the issue of whether she can testify about what Patty said, we believe that there are two exceptions to the hearsay rule that apply here. One, we believe that these utterances by these two women were close enough to the event in question, which is the central event of this lawsuit, that they qualify as excited utterances.

Number two, her testimony impeaches the testimony of Patty Stephens, which was given in this courtroom last Tuesday, as to whether she ever told anyone, anyone, that she thought, she, Patty, thought, there were to be jobs and trips [736] as a result of this meeting.

THE COURT: Mr. Lloyd?

MR. LLOYD: These were certainly not excited utterances. I don't know whether it's impeachment or not. I don't remember the question being asked of her whether she ever told anybody. I can't address that. But I certainly think that after getting her home and relating a tale is not an excited utterance. An excited utterance is spontaneous under intense excitement.

THE COURT: My impression had been that she was talking, that there were three people there, her mother as well. Clearly, she cannot relate anything her mother says.

MR. CREIGHTON: No.

THE COURT: If you are limiting her statements to what Miss Stephens said, I would think that is impeachment. That the problem, I suspect, is which of Mrs. Stephens' statements is she going to impeach?

MR. LLOYD: I don't remember the foundation being laid for that, "Did you ever tell anybody?" I don't remember that:

MR. CREIGHTON: We have the transcript.

MR. IRWIN: We were careful to lay the foundation.

THE COURT: If Mr. Creighton says—I don't [737] have any independent recollection, but I'm going to let you do it. I will permit you to elicit testimony from Mrs. Stephens only.

MR. CREIGHTON: Yes, sir.

Before the Jury:

THE COURT: Members of the jury, a question of hearsay has come up from time to time and it is now coming up once again. I explained to you that generally a witness may not testify as to what someone else has said. I pointed out that one exception that came up was

a statement made by a defendant, or in the case of a corporate defendant, someone who is in a position of authority.

There is another exception, a witness may testify as to hearsay, that impeaches another witness's testimony. The term "impeach," for our use, is synonymous with discredit. All too often we think of impeach in terms of a public official, but in terms of evidence, the word impeachment means to discredit. Therefore, a witness may testify as to what another witness said if that statement would tend to impeach that other witness's testimony.

You may proceed.

By Mr. Creighton:

Q. Miss Thompson, going back to that meeting with your mother and Patty Stephens on September 17, where did that take place?

[738] A. In our bathroom.

Q. Why in the bathroom?

A. So when we come in the house, we was talking pretty loud and it was like 5:30, six o'clock in the morning and Mom says, "You are going to wake the kids and your father up. Let's go in the bathroom where we can talk."

Q. During the discussion in the bathroom with your mother and Patty Stephens, what did Patty Stephens say concerning what had occurred at the meeting that you had just come from? I do not want to know and I don't want you to testify about what your mother said. What did your sister, Patty Stephens say in the presence of you and your mother?

A. She told Mom, just like I did, that we was going someplace, that he was going to get something from these people, and she wanted to know if Mom would keep the kids while we went to Florida, because we had had a trip to Florida offered to us.

MR. CREIGHTON: Your Honor, might I have just a minute?

THE COURT: Take your time.

MR. CREIGHTON: Your Honor, we have no further questions of this witness at this time.

THE COURT: Mr. Lloyd, do you wish to inquire?

MR. LLOYD: Would this be an appropriate time—

THE COURT: Come to the bench, please.

[739] At Side Bar:

MR. LLOYD: I anticipated the recess.

THE COURT: No problem. There's only one thing that I'm now going to insist upon, however. I do not wish either side to speak to this witness during the recess, nor may anyone else speak to her.

MR. LLOYD: Don't worry about it.

THE COURT: Ask Steve to come over. Mr. Snyder, I've just instructed the attorneys that no one, neither counsel nor anyone else may speak to this witness during the recess. I'm not quite sure where she can be placed without her having some fear that she's being in custody. The easiest answer that I can think of is perhaps—Patty, the lady Marshal, could she just stand with her during the recess? I want it understood no one may approach her.

Before the Jury:

THE COURT: Members of the jury, we will take our morning recess at this time.

(Court was in recess at 10:25 a.m.)

[740] Before the Jury:

THE COURT: Mr. Lloyd, you may proceed.

CROSS-EXAMINATION

By Mr. Lloyd:

Q. Miss Thompson, the night that you and your sister were taken over to Connaughton's house, now I'm talking about the seventeenth of September, you and she had just gotten off of work at Rink's, had you not?

A. Yes.

Q. When you were interviewed by Miss Long and Mr. Blount of the Journal News, you told them you were unemployed, didn't you?

A. I was at the time I gave the interview.

Q. But you led them to believe you were unemployed at the time you talked to Dan Connaughton, didn't you?

MR. CREIGHTON: Objection.

THE COURT: Overruled.

THE COURT: You may answer.

A. No, not really. They asked—they really never asked me if I was employed and I didn't take that as being fully employed because I had only worked there for two days, two and a half days, excuse me.

Q. Now, the interview you had on the seventeenth of September with Mr. Connaughton and others was arranged by your mother, was it not?

[741] A. I do not know that.

Q. It may have been?

A. When we come home, my mother, Joe Cox and Dave Berry was sitting in the front yard.

Q. Now, did Dan interrogate you at all during that discussion that was held at his home on the seventeenth?

A. Yes, he questioned me.

Q. He did?

A. Yes.

Q. Were tapes made of that meeting?

A. Yes.

Q. Were his questions to you off the tapes?

A. Some was on, some was off.

Q. So his voice was on the tape, right?

A. Sometimes.

Q. Have you ever heard that tape?

A. No.

Q. Did he ask leading questions of you so that all you could do was give yes or no answers, or was it a pretty open discussion?

A. Sometimes, it was a yes or no. Sometimes it was open discussion.

Q. Do you remember telling Miss Long and Mr. Blount when they interviewed you on October 27 that Dan led you and all you could do was answer yes or no? [742] A. Yes, I did say that.

Q. Do you remember telling them that "You won't hear Dan's voice on the tape?"

A. I said, "You won't hear some of his offers or some of him talking, because he turned the tapes on and off."

Q. Okay. You remember—let me ask you this question. Strike that, would you, please.

When was it during that interview that Dan told you that he wanted to use the tapes to play them for Dolan and New to get them to—to get Dolan to resign so he could get on the bench? At what point during that long discussion did he make that statement, Miss Thompson?

A. When we got there and I seen that there was tape recorders going and he had tape recorders ready to go. I asked him what he was planning on doing. That's when he told me, when we first got there.

Q. Did he turn the tape off and then tell you that?

A. Yes.

Q. In other words, you asked him, "Why are we here? What's this all about?" Then he turned the tape off and answered you, right?

A. No, he was getting the tape recorder set up, him, Martha and Dave.

Q. Well, do you remember telling—let me ask you to do this then. Let me ask you—Sir, would you please [743] hand the witness—I never can remember the name of this. Defendant's Exhibit J.

Would you turn to page 22 of that, please?

A. Do you see where it says A, I guess that's answer, "They started asking me," is that your—is that you? Is that your answer, page 22, the long paragraph? "They started asking me a bunch of questions."

THE COURT: Miss Thompson, do you know what this is?

A. Yes, I seen the front of it.

Q. I'm sorry, maybe I didn't go into it.

THE COURT: You didn't.

Q. This is a transcript of an interview—of the interview that Mr. Blount and Miss Long conducted with you on the twenty-seventh of October, 1983. Do you see that?

A. Uh-huh.

Q. You knew this was being taped, did you not?

A. Yes.

Q. On page 22, do you have 22?

A. Yes.

Q. Did you make that statement, "They started asking me a bunch of questions so I asked Dan Connaughton, I said, 'Let me ask you this.' I said, 'Why are we here?' I said, 'Why are you doing this, you know?' I said, 'That's the whole—what's the whole deal?' Of course, he turned off [744] the tape recorder, and he said, 'I'll tell you the truth.'" Did you make that statement?

A. Yes, I did.

Q. But that isn't the way it happened, is it?

A. Yes, he was getting the tape recorder set up. He was turning them on, he was asking us what our names was, I said, "Wait a minute," and he turned them off. You know, he was getting them set up. Martha hadn't even got hers out of her purse; she was getting hers out of her purse.

Q. Well, so if we play that tape, we wouldn't hear you ask that question?

A. I don't know.

Q. Let me ask you, when you had the meeting with Mr. Blount and Miss Long, do you know what time of the day that started?

A. I couldn't remember.

Q. Do you remember where it was held?

A. Yes.

Q. Where?

A. In Hank Masana's, in his office.

Q. How long were you there—strike that. How long—Did you talk, I've got to ask it this way. Did you have

a discussion with Mr. Masana, Mr. Blount and Miss Long a while before the tape was actually made?

A. It was a few minutes.

[745] Q. Do you remember how long it was you talked to them before they made the tape?

A. No, they was getting set up. They was getting the tape recorder ready.

Q. Did they tell you why they wanted to make the tape?

A. Yes, for their record. I could have a copy. Dan could have a copy. They was going to call Dan and get his side of the story. They had to have it for the record. They asked me if I had any objections to it. I said no.

Q. Do you remember Mr. Blount saying, "Well, Dan won't hear the tape"?

A. No. He said he would.

Q. Would you look at the exhibit, please, the document you were handed a minute ago? Look at the first page. Do you see where it says, Mr. Masana, "First off you had indicated you would give Dan an opportunity to respond to that if that prelude is on there." Do you see that?

A. You've lost me. What page?

Q. Front page, page 1.

A. It's Pam Long talking?

Q. Well, who was talking?

A. If I'm on the right page.

Q. Are you on page one?

A. Yeah.

[746] Q. Front page?

A. Yeah.

Q. Miss Long says, "He's not going to hear the tape. No, that's ours."

A. Okay.

Q. Do you remember that?

A. Okay.

Q. Remember that?

A. Because, like I said, it was for the record.

Q. You remember them saying that?

A. No.

Q. Well, it says here—

THE COURT: Excuse me, Mr. Lloyd. She's answered, she doesn't remember. Go to your next question.

MR. LLOYD: I understand.

Q. Going back to the meeting in Mr. Connaughton's office, excuse me, his home, on the seventeenth, you said you told the Journal News that Mr. Connaughton made a series of promises to you during that discussion?

A. Yes.

Q. Right?

A. Yes.

Q. Now, at what point during the entire discussion did you make these various promises?

A. There were various times, different times in the [747] evening.

Q. Were any of them, were any of those statements made on the tape?

A. No.

Q. Well, you said that he promised you and your sister a trip to Florida, right?

A. Yes.

Q. Now at what time during the evening did he make that promise?

A. I wasn't looking at no watch. I mean it was various times he discussed the trip to Florida.

Q. Did he make various promises and various offers repeatedly through the entire meeting?

A. Yes, I would say it was made on and off.

Q. In other words, okay. Now, tell us all the different things he promised and offered during that evening, please.

A. Well, one was a trip to Florida that him and his family was getting ready to take, it was two weeks in Florida. He told me that they would take us with them, set us up. They had a condominium that we could stay at for two weeks.

Q. In Florida?

A. Yes.

Q. When did he say that, what time during the [748] meeting?

THE COURT: Mr. Lloyd, now, you've been through this and this witness has said that she can't tell you what time. You go to your next question, please.

Q. Do you know what time he said any of these things?

A. Different times in the evening.

THE COURT: You have exhausted that point.

Q. What else was it that you say you told the Journal News he said?

A. He said that he would find us a good job, you know, and see that we was taken care of.

Q. Did he say where he was going to get you the job?

A. He mentioned to Patsy. I was sitting right there, I heard him mention to Patsy that he thought she would be good working in the court.

Q. Did he promise to hire her in the court?

A. He told her he was going to see what he could do.

Q. What kind of job did he promise you?

A. He just told me—he asked me what kind of work I had done before. I told him I've helped out bartending before and I wanted to get away from that kind of thing. He said that he would find me a respectable job.

Q. Was Mr. Cox at that meeting?

A. Please?

[749] Q. Was Mr. Cox there at that meeting?

A. Yes, he picked us up.

Q. He stayed there the whole time?

A. I couldn't tell you exactly if he went in and out. Everybody was getting up and getting drinks and going to the bathroom.

Q. Was Mr. Berry there at the time?

A. Yes.

Q. Were Mr. and Mrs. Barnes there?

A. Yes.

Q. Was Mrs. Connaughton there?

A. Yes.

Q. Were these statements made, that is, these promises, and offers, by Mr. Connaughton made in the presence of those other people?

A. Like I said, everybody was getting up and moving around different times. I don't know exactly who was sitting there when what was said because people would get up, different ones would go to the bathroom, go get softdrinks.

Q. Well, are you saying that, well, I'll ask it this way. Did he say these things in the same tone of voice, in the same voice volume he'd been using with the rest of the discussion?

A. Yes.

Q. He didn't take you aside and out of the hearing [750] of the other people and say these things, did he?

A. No.

Q. So you think that whatever he said you heard that the other people there could probably also have heard, right?

A. Yes.

Q. Have you ever been a patient in the Hughes Psychiatric Hospital?

A. Yes, I have.

Q. Weren't you there for taking an overdose, right?

A. No, not taking an overdose, not in Fort Hamilton, that's Mercy.

Q. Where were you for attempted suicide?

A. Mercy.

Q. Do you remember the day that your name came out in the paper, in the Hamilton Journal? Was that the fifth of October when you were listed as a witness?

A. I couldn't tell you exactly the date, but somewhere around there.

Q. Do you member what you said to Patty when you saw your name in the Journal as a witness?

A. I said, "I can't believe this. He said our names wouldn't be mentioned."

Q. Well, you got some phone calls that day from people who were alarmed about your name being in the paper, isn't that right?

[751] A. No, that was when my name came out in the Cincinnati Enquirer.

Q. Did you, on either of those occasions, tell your sister that you were going to the newspaper and tell the paper that the reason that you gave this information was because Mr. Connaughton made promises and offers to you?

A. No, it was a few weeks after that.

Q. Whenever, you at least did say that, didn't you?

A. Yes.

Q. And you didn't want people to think you were a narc and a snitch?

A. Yes.

Q. Well, you weren't talking about narcotics, were you, in any of these statements?

A. No.

Q. Why were you afraid someone would think you were a narc? What is a narc?

A. I didn't use the word narc; I said snitch. I didn't want people to think that I went running around telling tales, telling everything I knew on people, you know. I stick to my own business.

Q. In other words, even though you told the truth about people, you didn't want them to know it, right?

A. No the way it made them look. Not the way it made me look. It looked like I went to them and said, "Hey, [752] I know this, I'm going to tell." I wanted them to know the real story.

Q. But before you had the meeting with Mr. Blount and Miss Long in Mr. Masana's, did you speak to Mr. Crehan?

A. Yes, I did.

Q. Who initiated that discussion?

A. I called him.

Q. Why did you call him?

A. I had used him in the past to handle my assault case, so I contacted him and wanted to know how I could go about about telling my story without getting in trouble.

Q. You wanted to tell the newspaper?

A. Yes.

Q. You wanted the newspaper to run a story about why you made your statements to Mr. Connaughton, didn't you?

A. Yes, I wanted them to know the real truth.

Q. You wanted a big enough story so the people in Hamilton that you were concerned about would see it, didn't you?

A. I didn't know how big the story was going to be.

Q. Do you remember at the meeting you had with Mr. Blount and Miss Long whether Mr. Blount promised you that there would be a story?

A. Please?

Q. Did Mr. Blount promise you there would be a [753] story?

A. No. I just gave him my story, you know. They said they was going to check it out and was going to call Dan, see what he had to say.

Q. Well, did you tell Mr. Crehan what you wanted to tell the newspaper?

A. I told—I didn't go in all the details, no.

Q. You knew that Mr. Crehan was a supporter of Judge Dolan, did you not?

A. No, I didn't, not for sure.

Q. Did you know Mr. Masana was?

A. No.

Q. You knew he represented Billy New?

A. Yes.

Q. And did Mr. Masana arrange for you—excuse me, did Mr. Crehan get in touch with Mr. Masana and arrange for you to talk to Mr. Masana?

A. I told Matt Crehan that I wanted to talk to Hank Masana and the newspaper.

Q. You went to see Mr. Masana to talk to him a couple weeks before you had the meeting in his office with Mr. Blount and Miss Long, didn't you?

A. It wasn't a couple weeks.

Q. How long before was it?

A. I believe it was just a few days. I can't [754] remember for sure, but I don't think it was a couple weeks. It just don't seem like it would have been that long.

Q. Do you remember having a dispute with your sister, Patty, the last week after there was an article in the Journal News about her testimony in this case?

A. It really wasn't a dispute. She works at the store below my apartment and my mother had just took a picture down of me and my four sisters that we had made and it was in the store and I went down to the store to get me a pack of cigarettes. She had scribbled her face out of the picture. I told her, I said, "Patty, I paid for that with my own money. You had no right to do that." I said, if you want your face out of it," I said, "here is how you do it." I just ripped the face, the rest out of the picture. I said, "If you want your face out, I will take it out." I walked out of the store.

Q. Does she have a son?

A. Yes, she does.

Q. Did you have a dispute with him?

A. He came out of the store cussing me.

Q. Did you pull a handgun and point it at him?

A. No, I didn't.

MR. LLOYD: May I have a minute, Your Honor?

Q. You mentioned or you told us that on the seventeenth of September, '83, Dan Connaughton promised you [755] trips, you and your sister a trip to Florida and jobs. Did he promise anything else to either of you on that occasion?

A. There was talk about the restaurant then. There was talk about the restaurant in the other meetings too.

Q. Was a promise of any kind made with reference to a restaurant?

A. Victory dinner at the Maisonnnette. I believe that was the second meeting, the day we went to Bob Evans.

Q. I'm really thinking, I'm trying to find out all the things that you claim he promised you the night of the seventeenth.

A. Trip to Florida, job, our names would not be mentioned.

Q. He didn't say, "I'll try to keep your names out of it," did he?

A. No, he promised me that my name would not come out.

Q. That was a flat-out promise?

A. Yes.

Q. And he said that he was going—Well, I don't want to ask an argumentative question, but did you consider that if the tapes were played for Judge Dolan, your name probable would come out?

A. No, like he said, Judge Dolan and Billy New was the only one he was going to play it for. And he said, I [756] said, "Dolan is going to hear." He said "Surely, Dolan ain't going to let nobody else hear them."

Q. You told the Journal News he was talking about blackmail, didn't you?

A. That's what I considered it. That's my own opinion.

* * *

[TESTIMONY OF ZELLA McQUEEN]

* * *

[757] Are you the mother of Alice Thompson and Patty Stephens?

A. Yes, I am.

Q. Do you recall a time in September of 1983 when your daughters returned home early in the morning from a meeting at the Connaughton home?

A. Yes, I do.

Q. Can you tell the jurors in your own words what happened when they came home?

A. They came in and it was early morning, and they were all excited and talking and I asked them to be quiet, that they would wake up the rest of the house. We decided we would go in the bathroom where we could shut the door and talk. We went in there. They was discussing everything about being over to Mr. and Mrs. Connaughton's house, and about the things that was said and everything. They were real excited just like if they were opening Christmas, they were so excited about everything that was said about trips and jobs and about all the stuff going on.

[758] Q. Let me ask you what your daughter, Patsy Stephens, said to you in the bathroom that morning. Did she tell you anything about a trip somewhere south, to Florida?

A. Yes, she did. She said that she and Alice had been offered a trip and would I help take care of the children. They would make it worth my while if I would help them take care of the kids.

Q. Which kids are these?

A. Alice's little girl and Patsy's son and daughter.

Q. Can you tell me whether Patsy told you anything that night about any jobs that were in the offing for her and Alice?

A. She said that Mr. and Mrs. Connaughton said that they would take and help them get a good job, because

they was speaking about they didn't have a good job and they would help them get a good job. They would also help me get one.

Q. What did Patsy say about a job for you?

A. Patsy said that Mrs. Connaughton said that she would open some kind of a little restaurant or something up and that they would put me in there and that it would be a lot easier than the work I was doing.

Q. Did Patsy tell you anything about her name not being used by the Connaughtons?

A. They told me that Mr. and Mrs. Connaughton said that their names would not be used, that no one would know [759] that they was making contact with them. That their names would not be used, yes.

Q. Did they say anything about the possible—did Patsy Stephens say anything about a possible resignation of Judge Dolan?

A. They said that, yes, Patsy said that they was hoping to get Mr. Dolan to resign before the election time so Mr. Connaughton could go on in to the bench, uh-huh.

Q. Did anyone, prior to that time, had anyone else told you anything about getting Judge Dolan to resign?

A. Mrs. Connaughton said to me over there that day at my house, she said something about, "We are going to take and try to get the—"

MR. LLOYD: Objection.

THE COURT: Objection sustained. I don't believe the conversation with Mrs. Connaughton is admissible. You may proceed.

Q. Let me go to another subject, Mrs. McQueen. Would you please hand the witness the Joint Exhibit I, the November article?

Do you recall that article being published in the Journal News, Mrs. McQueen?

A. Yes, I do.

Q. Did that article accurately report the substance of what your daughters told you that morning?

[760] A. Certainly does.

Q. To your knowledge, had your daug. Thompson, ever changed or contradicted her claim were reported by the Journal News in that article?

A. No, she hasn't. She said, "This is true," and I believe it was because everything she said in here was what she had discussed it with me.

Q. Now, Mrs. McQueen, after this article came out has your daughter, Patty Stephens, ever told you that she agreed with the statements that Alice Thompson made to the Journal News?

A. She said, "Read it first," but then after it came out, she says, "I cannot do Connaughtons like this." She said, "They are too good a people and I'm going to stand beside them, Alice. You can say what you want to, but I'm going to stand for them." After—but she did agree to this when Alice said she was going to go and have it brought out at that time.

MR. IRWIN: Thank you, Mrs. McQueen. I have no further questions of this witness at this time.

THE COURT: Mr. Lloyd, do you wish to inquire?

CROSS-EXAMINATION

By Mr. Lloyd:

Q. Is your name McQueen or Breedlove?

A. McQueen. At that time it was Breedlove.

[761] Q. Are you referred to in the article as Mrs. Breedlove?

A. Yes, at that time I was Mrs. Breedlove.

Q. You divorced Mr. Breedlove?

A. Yes.

Q. Are you saying that when your two daughters returned home on the morning of the seventeenth, you were talking about all these things including a restaurant?

A. Yes, I am.

Q. They told you that the Connaughtons promised to establish a restaurant?

A. The one that's up there by his office, yes.

Q. And you were going to work there?

A. I was, the girls told me they were going to let me have the job, yes, that Martha and Dan, Martha was going to let me have the job, yes.

Q. Were they going to name the restaurant for you?

A. The girls says, "We think we will take," they said, "We think we'll name it," yes.

Q. You are sure that that all was said to you the morning of the seventeenth when they returned home from the Connaughtons?

A. They were all excited, yes, the words was said and the girls repeated everything that was put out here to me, yes.

[762] MR. LLOYD: Excuse me a minute.

Q. They also told you then they were promised by the Connaughtons a victory celebration at the Maisonnette?

A. Definitely, yes.

Q. That morning?

A. They told me that morning when they came home, said they discussed it and all of this was brought up that very day, but they had talked to Mr. Connaughton afterwards too about things, but at that particular time, they brought all this out, yes.

* * * * *

[TESTIMONY OF JAMES SCHMITZ]

* * * * *

[763] Q. Were you—did you have your position as the head of the detective department of the Hamilton Police Department in September and October of 1983?

A. Yes, I did.

Q. Can you tell me whether you had a role in the Billy New investigation?

A. Yes, I did.

Q. What was your role?

A. On September twenty-eighth in the morning, I received a written complaint—

Q. Let me just interrupt you for a moment. I want [764] to just do this in sequence. First of all, Mr. Schmitz, who was in charge of that investigation of Billy New?

A. I was in charge of the investigation from the Detective Bureau.

Q. Let me ask you if you were present at the time that Alice Thompson was interviewed by the police?

A. Yes, I was.

Q. Were you present at any time while Patsy Stephens was interviewed?

A. Yes, I interviewed Patsy Stephens.

Q. Were you able to verify the things that Alice Thompson told the police?

A. Yes, everything that Alice Thompson told the officers was verified. I verified it in Municipal Court and with two other witnesses.

Q. Were you able to verify the things that Patsy Stephens told the police?

MR. LLOYD: Objection.

[765] At Side Bar:

THE COURT: "Are you able to verify what Patsy Stephens told the police?" That's the question?

MR. LLOYD: About what, about Dan Connaughton or some issue in this case is one thing, but generally, no, I think it's inadmissible.

MR. IRWIN: Goes to credibility. It may be repetitious in light of this morning's performance.

THE COURT: Objection overruled.

MR. LLOYD: Are you sustaining it?

THE COURT: Overruled.

Before the Jury:

THE COURT: Objection overruled.

(Question read back.)

A. Yes, from the names that she supplied me with, I was able to verify the information that she gave me.

Q. Was there any information that she gave you that you couldn't verify?

A. There were some people we were unable to contact or some people refused to talk to us.

Q. All right. Did you find Alice Thompson to be believable?

A. Yes, I did.

Q. Did you find her to be unbalanced in any way?

MR. LLOYD: Objection, Your Honor.

[766] THE COURT: Overruled.

A. No, I did not.

Q. Now, you mentioned that you were present when Alice Thompson was interviewed. Can you tell me whether you recall her telling the police about her meeting at the Connaughton home and about jobs and trips being offered to her and her sister?

A. I heard her say to the two interrogating officers, mention of employment in a store or a shop that was to open on Court Street and also she mentioned a trip to Florida and the investigating officers advised her that they weren't interested in those things, just in the criminal activity. But I overheard those things mentioned in the general conversation. I was present some of the time. Some of the time I was sitting just outside the room at a desk.

Q. All right, sir. During the period of September, October and November of 1983, in the course of your duties, would you have occasion to see Mr. Blount with any frequency?

A. Yes, normally I had to go to a meeting on Wednesday at noon. I would see Mr. Blount there. Also during that period, I remember there was—he was in the Hamilton Police Department and I seen him on occasions sev-

eral times a week. We do discuss just general information.

Q. Do you remember any general discussion with Mr. [767] Blount regarding the Billy New investigation and the witnesses in the Billy New investigation?

A. No, I can't remember if any specific information was given to him or not by myself because there were, just after Billy New was arrested, there were just too many reporters who had called and inquired that I have no way of knowing who asked what or when.

Q. Let me direct your attention to the Billy New investigation. How was that initiated? What was the first thing that was done that began that investigation?

A. On September 28 in the morning when I reported for duty, I was given a written complaint by Lt. Reid, which had the signature of Dan Connaughton at the bottom. It was dated September 27, 1983. It was passed down through the Safety Director's office to us.

Q. What is that called again in?

A. It was a written formal complaint.

Q. Did you follow up on that complaint?

A. Yes, with the information stating on the complaint about the operation of the Hamilton Municipal Court, Billy New, Director of Court Services and Judge Dolan, I contacted Dan Connaughton at his office on that morning and asked for an appointment to talk with him. Sergeant Noes and myself walked over to Dan Connaughton's office. We arrived there at 11:24 a.m., met Dan Connaughton and we wanted to get [768] some background information on what he had obtained to make him file this complaint.

Q. Did you ask Mr. Connaughton about his motive in filing the complaint?

A. Yes. I was talking with Dan and he was giving me information. One question I asked him, I says, "Dan did you have any prior, any knowledge of this wrongdoing in Hamilton Municipal Court and Billy New's activity prior to your running for election?" He said yes,

he had heard the rumors, he had heard the allegations from several other attorneys. In fact, he said several attorneys had come to him and complained that they are losing business because Billy New was taking clients away from them in his operation.

I then asked Dan, "Dan, would you, had you not been running for judge, would you have made us aware of this complaint or taken some action?" He kind of grinned. He says, "I probably would not have." I then asked Dan another question, I said, "Dan, since you are running for judge, what are you concerned with? Are you concerned with the citizens, the operation of the Hamilton Municipal Court, or winning the judgeship?" With that, he said, "My answer is in the last paragraph of my complaint, and on second thought, to your other question, after thinking about it, yes, I would have taken some follow-up action."

The last paragraph of the complaint reads, "As an [769] officer of the court, I am compelled to report this activity."

Q. Did you put into your official report both Mr. Connaughton's first statement about his motivation and then his later retraction in that interview?

A. Yes, I did.

* * * * *

[TESTIMONY OF JAMES S. IRWIN]

* * * * *

[792-A] Q. Do you know the plaintiff, Dan Connaughton?

A. Yes, sir.

Q. How long?

A. Well, I've known Dan Connaughton most of his life. His father is a lawyer. His brother is a lawyer. I know the whole family. I guess I've known Dan fifteen or twenty years.

Q. Have you had any cases against Mr. Connaughton or with him?

A. No, sir.

Q. Does your practice of law often call for you to face Mr. Connaughton or his law office in cases?

A. No, sir. My practice does not coincide with the various specialty interests that Mr. Connaughton has.

Q. Do you have any personal friendship with or personal animosity against Dan Connaughton?

A. I would say I have a personal friendship with him. We were on the lawyer's baseball team together for a number of years. I was a pitcher and he was a hitter and a good one, and I have a lot of friendship for him, but it's, again, professional. We don't visit in each other's homes.

Q. Directing your attention now, sir, to Alice Thompson and the Alice Thompson and Dan Connaughton interviews. Could you tell us what your first awareness was [793] of the story that ended up being published, the November one story?

A. My first awareness was about a week before the article was published. I was in the editorial room of the newspaper, across the street from my law office, main office in Hamilton on a totally another matter. There were lots of things going on in the various fifty or sixty elections, and other news articles—we were over in the office there for legal advice and while I was conferring with the managing editor, Bob Walker. Jim Blount, the editorial director came up and advised us that the newspaper had just then been contacted by a woman named Alice Thompson, who wanted to talk with the newspaper and tell her side of the story as to how she became involved as a bribery witness in the complaint initiated by Dan Connaughton. That was my first awareness.

Q. Did you know Alice Thompson before that time?

A. Never heard the name before.

Q. What did you do after you heard this information from Mr. Blount?

A. Well, the next request I had, well, I didn't do anything that day. The next day or so, I was asked, I believe by Jim Blount, to go to the court records and to check to see whether there were any convictions for any crimes against Alice Thompson and I believe the name Patty Stephens was given to me also.

[794] Q. What did you find?

A. I went to the court records and I found that there were two misdemeanor convictions against Alice Thompson and I think some older court—

THE COURT: Ladies and gentlemen, offenses are divided generally into two categories, misdemeanors and felonies. For our purposes, the division has to do with sentencings. Sentences of a year or more generally are felonies. Those with sentences of less than a year are generally misdemeanors.

Q. The misdemeanor convictions for Alice, as I recall, was some kind of a petty theft or shoplifting and some type of like an assault and battery, family domestic thing. I reported that to the newspaper.

Q. Did the newspaper ask you to—for your advice on any other matters?

A. Well, yes.

Q. At that time before the publication of the article now we are speaking.

A. I was asked, I think next, which would probably be the Thursday or Friday before the publication, which was on Tuesday, I was asked whether the inclusion of a private citizen in an article would maybe constitute an invasion of privacy and what are their rights as against the candidate's rights.

[795] Q. Did you understand who the private citizens were?

A. I had been generally—let me start over. It had been generally related to me that the interview by—with Alice Thompson had now taken place and that there was

a meeting involving Mr. Connaughton and some of his close supporters, two women, and then some neighbors, I think Barnes, who were otherwise uninvolved in the campaign and so I was generally aware of that. I advised the newspaper.

Q. What did you do next with respect to this story?

A. The next contact I had was on the Monday, October 31st, I was advised that an interview had been set up with Mr. Connaughton to try to confirm what the claims of Alice Thompson and that the newspaper office was taking other measures to try to check out the story to see whether the claims had enough legitimacy to print. I was also asked to keep Tuesday morning, November first, open on my book.

Q. Were you later advised to the effect that they did want you to come in and look at the November first article or a draft of the same?

A. Yes, sir, I was.

Q. What did you do?

A. On Tuesday morning, November first, I was summoned to the publisher's office, Mr. Joseph Cocozzo, and I conducted what is known in our field as a pre-publication legal review, that is, a review of the article before it's [796] published, to render legal advice to the client.

Q. Did you do that?

A. Yes, sir.

Q. Would you tell the jury how you did it? In other words, what you did to conduct such a review?

A. In the publisher's office, the publisher, the editorial director, Mr. Blount, at times, the managing editor, were all available to me and I was present and there was a kind of like a galley sheet with the entire story printed out and I reviewed it carefully.

Q. Let me interrupt you for a second. I apologize. A galley sheet, would you tell the jury what that is, as opposed to the article that was finally published?

A. In a newspaper, it's published in columns that fit a certain area, but when it comes out of the machine

where they type it in, it's almost like a long roll of tissue paper and it's printed out. That's what I reviewed and that's what I referred to as a galley sheet.

Q. Continue with your answer as to what you did.

A. I reviewed it line-by-line, asked a lot of questions.

Q. Who did you ask questions of?

A. Primarily, Jim Blount with whom I have worked for fifteen years in the field.

* * *

[801] Q. Did you satisfy yourself that the interview of Dan Connaughton was faithfully, truthfully being reported to you by Mr. Blount?

A. Well, I had to rely on what Mr. Blount said that it was accurate.

Q. Did you have any reason to disbelieve anything that Mr. Blount said to you?

A. No, sir.

Q. Sir, if Dan Connaughton had not confirmed the facts of the meetings with Alice Thompson, and confirmed that discussions of jobs and trips had taken place as reported in the article, would you have rendered the same legal advice?

A. No, I would have advised that I would not approve it from the legal point of view, if Mr. Connaughton had not confirmed the facts of the story.

Q. Would it be fair to say then that Mr. Connaughton's own confirmation—

MR. LLOYD: Objection, form of the question.

THE COURT: Sustained as to form.

Q. What if anything was the most important factor in [802] your rendering the advice that you did to the Journal News?

A. That Alice Thompson's claims seemed to make sense and that Dan Connaughton's interview confirmed all those basic facts, leaving only a question of interpretation for the readers of the article.

Q. Now, sir, did your analysis and your legal advice on this matter include a review of the headline?

A. It did not.

Q. You are familiar with the headline as it finally came out, are you not?

A. Well, there are really two headlines. One on the front page and one on the break page and I'm familiar with them, yes, sir.

Q. Would you have rendered the same advice if you had seen the headline that is there?

A. Yes, sir.

Q. Why is that?

A. Well, the headline is completely accurate. "Bribery case witness claims jobs, trips offered." The bribery case witness, of course, Alice Thompson was a bribery case witness, "claims jobs and trips were offered." So I thought it was accurate and I think it is accurate and I would have rendered the same advice. The headline on the break page is, "Connaughton supporters sought information," and that also appeared to be accurate.

* * *

[806] Q. The things said about Mr. Connaughton in that article if said about you, do you believe that that would have the potential to harm you professionally?

A. Yes, sir.

Q. So, the potential goes far beyond that of hurting someone's feelings. It goes to actually harming someone's professional reputation, doesn't it?

A. Set in the professional context, yes, sir.

Q. When you had your meeting with these folks at the Journal News about this article, you say you went over it line-by-line. Did you ask the author of the article or anyone else whether Alice Thompson used the precise phrases, "in appreciation of," and "dirty politics," or put it in quotation marks in the article.

A. My only recollection, Mr. Lloyd, the term, "dirty tricks." I don't recall any discussion about, "in appreciation for."

Q. You say that you didn't hear—read the transcript of the Connaughton interview, because it wasn't available, is that right?

A. I didn't ask and I didn't read it. I believed that it was not available, sir.

[807] Q. But you didn't inquire?

A. No, sir.

Q. Wouldn't you think that that would be an important thing to do, to verify what the article said he said is what he actually said?

A. I just relied on Mr. Blount that that was reported was accurate.

Q. Now, did anyone tell you that a tape was made, and a transcript was made of the interview that Mr. Blount and Miss Long conducted with Alice Thompson?

A. A transcript was made?

Q. Yes.

A. No, sir.

Q. Did you ask, "Can I see any record of your discussions with Alice Thompson?"

A. No, I didn't ask.

Q. Wouldn't it have been a good thing to check to see whether they were reporting her accurately, to read such a tape, transcript of what existed?

A. Mr. Lloyd, I'm a little bit confused. The interview with Alice Thompson with the Journal News you are saying?

Q. Yes, with Mr. Blount and Miss Long. Did you know that that article had been put on tape?

A. I did know that it was taped, yes, sir.

[808] Q. Was the transcript available for you?

A. I don't believe so. I didn't ask.

Q. Did you ask to hear the tape?

A. No, sir.

Q. Well, did it not occur to you at the time you had the meeting on the first, pre-publication meeting, that

Alice Thompson's credibility was one of the key factors that should be determined?

A. Yes, I thought Alice Thompson's credibility was an important factor.

Q. Did it not occur to you that one of the best ways to check on her credibility would be to read or listen to the tape of the interview?

A. No, sir.

Q. Now, what was your information so far as whether anyone at the Journal News had contacted Patty Stephens to see whether she verified what Alice Thompson said?

A. It's my understanding that there had been no contact with Patty Stephens before the publication, that she was supposed to get in contact with the Journal, and for some reason or another, it didn't occur.

* * * *

[817] Q. You thought, I take it, that this was probably a matter of misinterpretation on the part of Miss Thompson, is that right?

[818] A. I thought it was a difference of interpretation between Dan Connaughton and Alice Thompson and that, in a sense, both of them were telling the truth as they saw it. There's a difference of interpretation.

Q. You thought that Miss Thompson misinterpreted Mr. Connaughton's comments and discussions about jobs and trips, didn't you, sir?

A. I think there's a difference of interpretation.

Q. Well—

A. They both interpreted the same thing in different ways is what I mean.

Q. Do you remember when I took your deposition—would you hand the witness his deposition, please?

A. This is the one in September of '84?

Q. Yes, at my office in Cincinnati?

A. Yes, sir.

Q. You were I think represented by Mr. Creighton at that time?

A. Yes, sir.

Q. Would you turn to page 41 of that deposition transcript, please?

See my question to you, first question that appears at the top of page 41? Do you have that?

A. Yes, sir.

Q. See that question? Did I ask you this? "You [819] weren't told at that time that Dan Connaughton flat denied he made any offers or inducements to either one of those women?" I asked you that question, didn't I?

A. I have no distinct recollection, but it's here and I'm sure you did.

Q. Did you give this answer? "I was told as we went over this line-by-line that Dan Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips."

A. Yes, sir.

Q. And you also believed, did you not, sir, that at the time of publication of the article, the article drew no conclusion as to what was interpreted?

A. The article drew no conclusion as to whether her claims were right or Dan's responses were right, that's correct.

Q. The Journal News, by that, I include the author of the article, Miss Long, Mr. Blount, the publisher, Mr. Cocozzo, and you, the lawyer, didn't know whether she interpreted this right or wrong, did you?

A. I have no way of knowing in her own mind what she was thinking.

Q. For all you know, she might have mistakenly interpreted what was said, right?

A. They might have, yes, sir, I guess.

* * *

* * *

[824] By Mr. Creighton:

Q. Would you turn to your deposition at page 43 at the bottom, line X, which I believe begins with the answer that Mr. Lloyd just asked you to read a very small part of, from line D on page 45. I would like you to read to the jury Mr. Lloyd's question at the bottom of page 43, or I'll read [825] it. Okay, line W, question by Mr. Lloyd, "And these other people were there?"¹ Your answer, began on line X. I would like you to read the entire answer that you gave.

A. "And he confirmed that there was discussion with her about the possibility of opening up a restaurant or some kind of a business establishment in a building which he partly owned and he would eliminate the bar that was there, once the lease was up in September of '84, as I recall, being advised, and in the context of a young woman, I think twenty-one or twenty-two, who was unemployed or at least marginally employed, and whose family had been in the restaurant business, he confirmed all those things and the thought came, why would he talk with her about these things? I knew, as a lawyer, that, in fact, he did have an ownership interest in that building, and I knew that there was a bar there. I thought, well, how would they know that if he didn't tell her?

"He confirmed that he told her these things and he confirmed that there was discussions about maybe going to Hilton Head or Florida or going south, and he said, 'We did talk about that and we did talk about the Maisonnette or a nice restaurant.'

"This young lady, as I was given to believe, is just barely hanging on the economic margin of society, being driven up to her home in his Mercedes or his Buick to a [826] hundred thousand dollar plus home, she said he talked to her about these things. She thought he was

offering her something. He confirmed all that. He said, quote, she misinterpreted it, close quote.

"Well, I think that they were both maybe thought they were telling the truth. I'm sure Dan, as a very smart, educated lawyer and a friend of mine, wouldn't come out to some young girl in the midst of a heated election contest and offer something directly, and he was telling the truth there. And I could also see how he confirmed that we talked about these things, under these circumstances, Alice Thompson could very well have the opinion that there is something in it for me, if I continue to cooperate. All that was confirmed.

Q. Why did you conclude that Patty Stephens' interview and comments were unnecessary—were not necessary before the publication of this article?

A. Well, because in my opinion, in forming my advice, I felt that since the basic facts of the claims had been confirmed, that it was no longer essential to have the denial or the confirmation of Patsy Stephens. It was the claims of Alice Thompson and the responses of Dan, that's what I was thinking.

Q. As to the tapes of September 17, why did you conclude that those tapes—it wasn't necessary for the Journal News to listen to those tapes in full before [827] publishing the article?

A. There's really no dispute among any of the people that you could listen there for three hours to those tapes, or how many, two and a half hours, however many they run and you would hear nothing. Everyone agreed to that. Dan agreed there was nothing on there. Alice agreed there was nothing on there. So why spend the number of hours to listen when everybody agreed there was nothing on there?

* * *

[JURY CHARGE]

* * *

[911] * * * That being the case, all you need concern yourself with are these three elements. Defamatory, false, actual malice. That's all there is to libel. Let me discuss with you each of those concepts very briefly. What is defamatory? A statement is defamatory when taken as a whole it causes injury to a person's reputation or subjects a person to ridicule, hatred, contempt, shame or disgrace or affects such person adversely in a trade or profession. Well, what is false? A publication is false when it's not substantially true. The truth or falsity of a publication is based upon its nature and obvious meaning, taking into consideration the publication as a whole. A publication should be considered substantially true if the actual truth would produce the same impression on the reader as the statement which was made. Finally, what is actual malice? A publication is made with actual malice when made with the knowledge that it is false or with reckless disregard of whether it is false or not. A reckless statement is one made with serious doubt as to the truth of the statement before its publication. Actual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer. Rather, the focus of inquiry is on the defendant's attitude [912] towards the truth or falsity of the publication. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of its publication. To review very briefly, there are three elements of libel, defamation, falsity and actual malice. The plaintiff must prove actual malice by clear and convincing evidence. That at the time of the publication the defendant had knowledge that the defamatory material was false or that the defendant acted in reckless disregard of the truth by publishing when defendant had serious doubts whether the defamatory material was false or not. In

deciding whether the defendant published recklessly, you must decide the defendant's state of mind at the time of the publication. Now observe, the element of defamation and falsity need only be proved by a preponderance of the evidence. If you find that plaintiff has established by a preponderance of the evidence that the publication was defamatory and false, and that plaintiff has established by clear and convincing proof that the publication was made with actual malice, then the plaintiff has been libeled. The defendant may not be relieved from liability, therefore, merely by attributing the libel to Alice Thompson or by asserting that it quoted her accurately and completely. Ladies and gentlemen, your verdict must be unanimous. It must reflect the considered judgment of every juror. You [913] must all agree and indicate that agreement on the form of verdict. Do let me point something out. I have given you various rules of law to help you reach a just verdict. Some of them may or may not apply depending upon what you find to be the facts. Simply because I have given instructions does not mean that I'm giving my opinion. I have no opinion as to the facts in this case or which side should win. To assist you members of the jury, there have been two verdict forms prepared and three questions that you should answer. Let's deal with the questions first. Question number one, do you unanimously find by a preponderance of evidence that the publication in question was defamatory towards the plaintiff? And you can check that question yes or no. Two, do you unanimously find by a preponderance of the evidence that the publication in question was false? Yes or no. And third, do you unanimously find by clear and convincing proof that the publication in question was published with actual malice? Yes or no. If you have answered all three questions yes, you're to use verdict form one. If you have answered any question no, you're to use verdict form two. * * *

* * *

[JURY VERDICT]

* * *

[938] THE CLERK: Jury questions, number one, "Do you unanimously find by preponderance of the evidence that the publication in question was defamatory toward the plaintiff?"

"Yes."

Number two, "Do you unanimously find by a preponderance of the evidence that the publication in question was false?"

"Yes."

Number three, "Do you unanimously find by clear and convincing proof that the publication in question was [939] published with actual malice?"

"Yes."

* * *

[TESTIMONY OF MATTHEW CREHAN]

* * *

[1079] Q. Mr. Crehan, why did you, a Republican, choose to support Judge Dolan?

A. Judge Dolan, first of all, there was no Republican running for the position of Municipal Court judge. Judge Dolan was a Democrat and initially he had no competition.

[1080] When Dan decided to run for the Municipal Court bench, Judge Dolan, to avoid a primary fight with Dan, decided to become an independent and I supported him at that time but I had supported him before. Judge Dolan was basically a very, very popular judge in Butler County and Hamilton. He was fair with people, he was honest, his reputation was impeccable. He was—his reputation was one of being a very fair jurist. His reputation among the lawyers was excellent. His reputation among the voting public, I think, was excellent. He was just a good judge, doing a good job.

Q. Did you ever talk with Mr. Connaughton about his chances for winning that election?

A. Yes.

Q. What did you tell him?

A. Well, Dan and I met on at least one occasion but the one that sticks out in my mind is a conversation that he and I had when I met him and I was trying to talk him out of running for the position. I told Dan that I really felt that it was not right that he should take on a sixty-four year old man in his last term of office, basically, and run against him when Dan could probably have this office in five years if he really wanted it.

Q. Why did you say "last term of office?"

A. Judge Dolan could not run again. He was going to [1081] be seventy and in Ohio law you cannot run for judicial office after seventy years of age. Dan's comment was, "Why should I wait five years when I can get it now?" Then our conversation just about stopped.

* * *

[TESTIMONY OF JUDGE DOLAN]

* * *

[1141] Q. Judge, what is it exactly that Billy New was found to have done that was improper?

A. It's my understanding that Billy New was supposed to have taken money and also received certain sexual favors in return for making reports to me. I don't know if you are aware of the make-up of the Municipal Court. With the Court's indulgence, I will explain the Municipal Courts. Our court is unique in that we are in an old Kroger building. It was not designed as a court to begin with. It's a rather pityful court facility. Although, as I say, we handle some twenty-three thousand cases a year and last year around twenty thousand, the facilities, in other words, when I go off the bench, I walk from the bench, I go out the same door that everyone else goes out. I have to walk through the Cashier's Office where people are paying fines. I have to walk past the

Probation Department where people have been paying fines. I go through the Clerk's Office and go down a hall until I finally get to where my chambers are.

This creates a situation where, and the question came up quite often, "How's come you didn't see what's going on?" My job as judge is to hear the cases, to pass sentence and, thereafter, whether that person goes to jail, it's dependent upon reports from Probation Departments, from the clerk and that type of thing.

We do not have a facility for a large Probation [1142] Department who goes out and makes investigations due to the nature of our court, the number of cases going through, the fact that the maximum sentence that I can give is six months and a thousand dollar fine. Most of the fines, I mean, excuse me, most of the sentences range from three or ten days in jail up to maybe six months in jail, the majority of them may be thirty days. The sentences quite often are a hundred and costs and thirty days in jail for a first offender, traditionally.

In fact, almost any of the dockets, you can take the one this morning, in fact—I correct myself—I had two thefts this morning where they pled without an attorney, they received the same thing, one hundred and costs, thirty days in jail. That person is sent to our Probation Department who is in, you might use for example, I use these doors. Just outside that door is the Probation Department, the place I walk through. There they go out, either pay the fine or not. If they pay the fine and make arrangements to pay the fine, then a report comes back in to me, to determine whether I will impose the thirty days jail sentence, get a stay of execution, give them time to pay the fine or suspend it completely. Well, that situation, his job was to have the people when they came out—

* * *

[1148] Q. Judge, let me turn to the question of the Journal News' coverage of this campaign. Did you think

the Journal News was tough on you in any way during the campaign?

A. I thought for a number of years that the Journal News was tough on me, even before the election.

Q. Why, sir?

A. Newspapers can indicate their displeasure in a number of ways. One is by giving you publicity. The other is by giving you silence. For years, everything that came out of the Municipal Courts was reported as the Hamilton Municipal Court; my name was never mentioned.

The ironic or sad part about it, as far as I was concerned, would be that on maybe a page dedicated to court dispositions of the Municipal Court, the area courts and everything else, every other judge's name would be mentioned but mine. Whenever they ran, and let's face it, the driving under the influence is quite a burning social issue at the present time, it has been for the last couple years. Whenever an article was run about the driving under the influence, to have that article, whether I was in any way [1149] contacted about that article or not, they quoted the June Taylor case, and the fact that I suspended the six months jail sentence.

Q. Did they mention you by name?

A. Not by name, but every time that article was done, it was told, there was no question to anyone in our local small community as to who was being referred to as criticized.

Q. How about the Journal News' coverage of the Billy New story? How extensive or intensive was that?

A. I thought they covered it quite extensively and every article referred that he was my court—I appointed him. Instead of going into the facts of the case, every time, they mentioned that I appointed him and referred back to me.

Q. Did you appoint him?

A. I did appoint him, yes, he was a court employee.

Q. The Journal News ultimately endorsed you after the Butler County Grand Jury had cleared you as well as Mr. Connaughton of any impropriety regarding the Billy New event, is that correct, sir?

A. That is hard to answer yes and no, in this respect. The article wherein they gave their endorsements said—they waited until the last—and I think the article began—they normally, they endorse at least a week before [1150] the election, but due to the circumstances herein, they withheld their endorsement while they made more investigations. Then the article proceeded to again tell about Billy New and go through that and said it gave me the edge. But after rehashing the Billy New thing right before election again, I did not feel it was much of an endorsement.

Q. Did you make any effort to use the Journal News?

A. I never quoted the Journal News or anyone therefrom because I was afraid of the Journal News, that their silence, whether they would or would not help me.

Q. Judge Dolan, there has been testimony in this courtroom that the Journal News somehow conspired.

MR. LLOYD: Objection.

THE COURT: Objection sustained.

Q. Was anyone from the Journal News active in any way in your campaign?

A. No. I did put ads in the Journals News though and I gave them news releases, some of which they used and some they did not.

Q. Do you know Mr. Jim Blount?

A. Yes.

Q. Do you socialize with him or his family?

A. No. I'm sorry. I did attend an Appalachian affair several times. He has been at that affair, but it was a paid dinner where there were a lot of people there.

[1151] Q. You've never been to his home for dinner, for example, and he hasn't been to your home for dinner, has he?

A. No.

Q. To your knowledge, did Mr. Blount work in any way for your election?

A. No.

* * *

[1156] Q. Okay. Now, why did Billy New resign?

[1157] A. I asked for his resignation.

Q. Why was that, Judge?

A. The information came to me that he was acquainted with a Patsy Stephens, who was a Patsy Breedlove, who was a Patsy Scheiffer. The information came to me and I asked Mr. New to come to my office. I wanted him there before eight o'clock so I could talk to him before anyone else came in the place. At that time I confronted him with the situation of, "Do you know a Patsy Breedlove or Patsy Stephens or Patsy Scheiffer?" He said yes. I said to him, "How well do you know her?" I said, "Have you seen her anywhere else other than in this courtroom in your official capacity?" He said yes, and I said, "Where was that?" He stated that he was at her home and I said, "At her home?" He says, "Yes, Judge, but nothing would have happened if she had not come to the door in a negligee." I said, "Billy, I do not want to hear anything else. That we cannot tolerate. I'm asking you to resign." He forthwith gave me his resignation.

Q. Well, did you make an investigation of Billy New's activities to determine whether or not it was probably true that he was accepting money to fix cases in your court?

A. That I knew nothing of until it came out in the paper and I saw this article—the letter Mr. Connaughton wrote. The only thing I had heard was he was supposed to be having an affair.

* * *

PLAINTIFF'S EXHIBIT 1

MUNICIPAL COURT RACE WILL HAVE MORE THAN ONE LOSER

EDITOR'S NOTEBOOK

By Jim Blount

There will be more than one loser in the heated Hamilton Municipal Court contest between Judge James H. Dolan and challenger Daniel E. Connaughton.

One person will emerge from the Nov. 8 election as the winner of a six-year term on the court which serves the City of Hamilton and two neighboring townships, Ross and St. Clair.

But in the campaign debris will be more than a dejected candidate and a handful of disappointed campaign workers.

The Dolan-Connaughton battle has been all it was expected to be and more—and there is still more than a week before voters will have to go to the polls to make a choice. A lot could happen in the next eight to nine days.

ACCORDING to our recent observations, most voters consider it a tough decision—and getting tougher.

Last week's array of charges and counter charges probably has taken some votes from Dolan. But it isn't certain if it has boosted Connaughton's prestige.

It is certain, as the verbal firing continues, that more and more people will register their disgust and confusion with both men by refusing to vote for either candidate.

As the heat increases, it also appears most voters want to be sure they will support the most honorable and cleanest candidate, not just the one with the most appealing

face, the most familiar name, the most advertising or the most votes.

As one voter remarked, "I want to be sure that my vote won't be discredited by something that happens after the election is over."

Another said "I don't mind voting for people I know may lose an election, but I resent voting for a person who I later find has been deceitful or dishonest in campaigning."

Both comments came from persons who said they hadn't made a decision on the Hamilton Municipal Court candidates.

COMPLICATING the campaign are the bribery charges pending against Billy New, a former court employee.

Of course, it should be emphasized that New hasn't been tried, and that a person is presumed innocent until proven guilty. It also should be stressed that New hasn't been indicted. In fact, his case hasn't been weighed by a grand jury.

A Butler County grand jury is scheduled to begin hearing the New case Monday—which highlights some of the other potential losers in the Dolan-Connaughton scrap.

Whatever the outcome of the grand jury, more persons are likely to come under suspicion because of the intensity of the judicial campaign and the nearness of the election.

Those potential losers are Butler County prosecutor John Holcomb and the individual members of the grand jury.

Holcomb already has been attacked for (1) delaying the grand jury, (2) moving it up, (3) refusing to handle the New case in a special manner, or (4) all of the above, depending on the policies of the person rating his performance.

Although Holcomb understands that criticism and doubt come with the job, he also is aware that his handling of the case could become an issue in his own reelection campaign next year.

Consider these possibilities, all adverse to Holcomb:

- The grand jury indicts New. In the trial after the election, New is found guilty. If Connaughton loses the election, then later he could claim that Dolan's candidacy was aided by the timing, and that if the case had been expedited that the election outcome would have been different.

- The grand jury indicts New. In the trial after the election, New is acquitted. If Dolan loses, then later he could charge that Connaughton's victory had been because of the frivolous charges against New, which also damaged the judge's reputation. Dolan could argue that he would still be the judge if the matter had been resolved before Nov. 8.

ANOTHER potential loser is the media—especially the *Journal-News* and the *Cincinnati Enquirer*.

Stories on the Dolan-Connaughton fight in the *Enquirer* last week certainly helped to fuel the fire.

But in the process, the motives and credibility of the *Cincinnati* newspaper also are in question.

Some observers are asking how the *Enquirer* can justify the placement of a story critical of Dolan at the top of page one Thursday morning, Oct. 27, two days after U.S. forces participated in the invasion of Grenada, a day after the legality and necessity of the military action was questioned or condemned by some members of Congress and U.S. allies, and while the nation was still angered by the deaths of more than 225 U.S. Marines in a terrorist explosion last Sunday.

Judge Dolan suggested an answer when he charged Jim Delaney, an *Enquirer* editor, with threatening a page one smear Thursday morning if the judge didn't cooperate with the newspaper and its reporter (Karen Garioch), and if the judge didn't cancel a press conference, open to all media, scheduled for Thursday afternoon.

Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-makers.

MEANWHILE, the dilemma facing the *Journal-News* is what to do about an endorsement in the Dolan-Connaughton race.

Should the newspaper play it safe and skip an endorsement for fear that post-election disclosures could embarrass or discredit the newspaper?

Or, should a *Journal-News* editorial simply remind voters, as was mentioned earlier, that everyone is innocent until proven guilty and that, in fact, there are no charges pending against the judge?

But taking a safe, self-serving course would be shirking a responsibility held sacred by this newspaper.

OF COURSE, the big loser—almost regardless of the outcome—is likely to be the court and the entire judicial system.

Connaughton, in seeking election, has raised some interesting questions about the conduct of the court.

And, in defending his six years on the bench, Dolan has countered with some points which, while to his favor, also expose some potential faults in the system.

TO SALVAGE something positive out of this campaign, perhaps there should be a resolve to take a close look at the local system of justice.

This would not be a sensational expose focusing on personalities and politics, but on the system itself.

Instead, it would be a calm probe searching for shortcomings and potential trouble spots in procedures, policies, existing laws, etc., which, regardless of the capabilities of the judges, interfere with justice.

The only question would be: "What changes are necessary if the judicial system is to work with efficiency and with fairness?"

Unfortunately, that can't be done before Tuesday, Nov. 8.

PLAINTIFF'S EXHIBIT 2

The Cincinnati Enquirer—Thursday October 29, 1983

JUDGE'S CLOSED-DOOR CASES
RAISE LEGAL EYEBROWS

BY KAREN GARLOCH
Enquirer Reporter

HAMILTON, Ohio—Hamilton Municipal Court Judge James H. Dolan routinely decides cases behind closed doors, an unorthodox and apparently unconstitutional practice, an *Enquirer* investigation has determined.

Dolan's practice of hearing cases privately figures prominently in bribery charges now pending against Dolan's court administrator, Billy Joe New.

So widespread is the practice of disposing of cases in Dolan's chambers that it frequently results in a line of lawyers waiting outside the judge's office and sometimes delays the start of regular court sessions.

Hamilton Prosecutor Jerry Pater acknowledges that he rarely attends the early morning in-chambers sessions and said it was not at all unusual, prior to New's dismissal, for New to announce in open court that a given case had already been adjudicated when Pater called the case in open court.

THE PRACTICE of disposing of cases in chambers appears to violate the U.S. Constitution, the Ohio Constitution and the Code of Judicial Conduct.

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right to a "speedy and public trial" and that assurance is repeated in the Ohio Constitution. Dolan's practice also is construed by some legal experts to be contrary to Canon 3A(4) of the judicial code of

conduct which prohibits *ex parte* hearings, or hearings which involve only one side.

However, judges and law professors contacted by *The Enquirer* were reluctant to say outright that the practice is unethical, especially because the prosecutor knows and does not object.

As to public trials, a 1980 U.S. Supreme Court opinion, written by U.S. Chief Justice Warren Burger, emphasized the constitutional importance of public trials. Burger's opinion came in the case of *Richmond Newspapers vs. Virginia*.

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing," the chief justice wrote. "When a criminal trial is conducted in the open there is at least an opportunity both for understanding the system in general and its workings in a particular case."

THE ENQUIRER was able to research at least three instances where the practice led to abuse.

- In one case, a Hamilton police officer who had nearly been killed by a man he then charged, at the judge's suggestion, with resisting arrest, was not called to testify at the defendant's hearing even though he was told he would be. The hearing was held in the judge's chamber. "I didn't even get to testify in court," said Police Officer Sam Hopkins.

- In another, David Robertson, a Hamilton citizen who signed a warrant for assault against a man who had broken his nose, was never called to testify against the defendant. Robertson's mother, Charlene, said, "David didn't even know until it was all over. We don't know what he was fined."

- In a third case, James D. Smith was found guilty of having a weapon while intoxicated even though he never

had an attorney, never waived an attorney and did not appear before the judge. A relative of Smith's, who attended court with him, said "Billy New came out and said his fine \$250 and \$50 court costs." Later, they learned the fine was really \$50 and \$25 court costs. "We thought we'd been ripped off," the relative said.

DOLAN CANCELLED a scheduled interview with *The Enquirer* Wednesday. Instead, he called a press conference for today at his office to answer questions about the operation of his court.

Previously, Dolan acknowledged that attorneys often complained that New "was practicing law. Maybe I didn't have enough control."

As for holding the in-chambers hearings, Dolan is apparently ignoring a pledge he made during his successful 1977 campaign for judge.

A Dolan newspaper advertisement that year addressed plea bargaining and was headlined "No Backroom Deals." In it, he promised that "no attorney shall be permitted to discuss any case without the prosecutor present."

Among the lawyers who acknowledge disposing of cases in Dolan's chambers is Dan Connaughton, a Hamilton lawyer who is challenging Dolan in the Nov. 8 election.

Connaughton recently brought the complaint that resulted in bribery charges against New, Dolan's former court administrator and clerk. Connaughton is the Democratic candidate, and Dolan, a Democrat, is running as an independent. There is only one municipal judge in Hamilton.

Connaughton's initial objections to Dolan's administration of his court centered on New's conduct. But he acknowledged that he himself was among the lawyers who had participated in the private court sessions on behalf of clients.

WHEN ASKED why he did, Connaughton said, "First and foremost, I had an obligation to represent my client."

He recalled numerous occasions in which he would enter guilty pleas for clients charged with driving under the influence of alcohol (DUI) or drugs.

On other occasions, he said he was able to get DUI charges reduced to charges of reckless operation. All that was done in the judge's chambers, he said, without consulting the prosecutor before or after seeing the judge.

Connaughton said the judge usually would write the disposition of the case jacket (the prosecutor usually does that in open court hearings), and the case would never go to open court.

Although he participated in the practice, Connaughton is now complaining that the "shoddy, pre-trial practice which Judge Dolan instituted and lives by . . . permitted Billy New to get away with what he's doing."

Matthew Crehan, a Hamilton lawyer who routinely handles cases in municipal court and is a Dolan defender, said Dolan's court is one of the busiest in Ohio with 23,000 cases a year and that the judge's policy of disposing of cases in chambers saves time both for the lawyers and for their clients. "He (a defendant) doesn't have to wait around half the morning."

CREHAN said Dolan "works his fanny off" and, by his practice of in-chambers hearings, makes it possible for lawyers to get their cases heard more quickly than in other courts. "We get judgments made. We keep people from shooting each other. If you couldn't hear a case expeditiously, we would have a lot more violence."

When dispositions are made in the judge's chambers, Crehan said, "It's never a situation where there's any kind of a contest on the facts at all." If there is disagreement on the facts or if a reduction in charge is

proposed, Crehan said, "the prosecutor would always be there."

As city prosecutor, Pater arrives for court to find lawyers waiting to see the judge. He is aware that cases are disposed of in chambers, he is almost never present and doesn't object.

"I get down there at 8:25 in the morning, and there are a lot of lawyers waiting to see the judge and plead out their clients," said Pater. "I don't even bother watching because there's too many . . . Yesterday morning (Oct. 18), I don't think we started court 'til 9 o'clock. It took the judge that long (to dispose of the cases that attorneys brought to his chambers.)"

SOMETIMES, PATER said, attorneys consult with him before going to see the judge. Most times they don't.

Pater said it was not unusual for him to call a case in open court and for New to proclaim that it had already been heard. "I wouldn't think a thing about it."

Six years ago, before Dolan was first elected, Pater also served as prosecutor under former Judge Richard Berridge, who refused to dispose of cases except in open court. But Pater said Berridge "was unique in that regard. Other judges do."

Pater said he's never objected to Dolan's practice because he has never had reason to believe that justice had not been served.

"It's not my job to dispose of the cases. If a guy's going to go in and plead out (plead guilty), I don't believe the judge is going to put any different disposition on the case whether I'm there or not . . . He and I have, I'd say the same thinking . . . I know what his feelings are.

"By his hearing the guilty pleas right off the bat, that frees me to do other things. The judge never asked me if it was okay if he did it that way. He's the one that tells me how the court is going to run.

Pater acknowledged that he is not informed of every disposition and doesn't take the time to check the outcome of every case. "We have too many cases here for me to go back every day and check every one of the cases the lawyers have heard with the judge."

JUDGES AND law professors contacted about the practice said it could open the door for possible abuse.

The first of the three cases described above occurred two or three years ago. Police Officer Hopkins said the defendant, James Hibbard, a Hamiltonian, nearly ran over him with his van when Hopkins tried to arrest him on an outstanding warrant. Hibbard was apprehended several days later, but in the meantime Hopkins said he went to municipal court to take out a warrant for felonious assault against Hibbard.

On Dolan's advice, Hopkins said he made the charge resisting arrest. "He told me he would really zing him," Hopkins said. "He said he'd want me to come and testify so it would be on the court record."

However, on the night before Hibbard's case was to be heard, Hopkins said he got a call from a court employee telling him the case had already been heard in chambers. Despite a note on the case that Hopkins should be called, he wasn't.

Hopkins said Hibbard was fined \$50 and costs and sentenced to jail. The jail term was delayed until a later date. "I don't know whether he did his days. I didn't bother to look. You can't do too much," said Hopkins.

IN THE second case, decided on Sept. 15, 1983, Gaven McQueen was found guilty of assault, fined \$30 and court costs and ordered to pay the medical bills for the complainant, David Robertson. The disposition was written on the jacket in Pater's handwriting, indicating that it was heard in open court.

However, Robertson, who took out the warrant on McQueen, was never notified of the hearing.

Robertson's mother, Charlene, said someone from the court called her home after the case was heard. She was glad to have the medical bills paid but questioned why they weren't notified of the hearing.

"David didn't even know until it was over," she said. "We don't know what he (McQueen) was fined."

PLAINTIFF'S EXHIBIT 33

Portion of Transcript of September 17, 1983 Meeting

TAPE 1

M1 Patsy, let's start with you. What was your first experience in Municipal Court? Or how long ago was it that you first went down there? Do you remember? In whatever, for whatever reason, for yourself or Jack?

F1 I'd say about three years ago. Two and a half or three years ago.

M1 Did you ever go down to Municipal Court when you were married to Jack?

F1 Yeah.

M1 Okay, that was between 75 and 77 you were telling me?

F1 Yeah.

M1 Now, was that the time he went in front of Judge Berridge?

F1 He went before Berridge before, but, I'm trying to think. When did Dolan take office?

M January 1, 1977.

F1 Okay, then I'll start with

M '78

F1 Okay, whenever he

F2 Remember, it was after I had — when it all started because remember when we got arrested I was pregnant and they had to throw out the charges because I was under age. I was only 17 and so that was in '78

F1 No, this was before Dolan went (inaudible)

F2 Yeah, you all went before Dolan but that was before you knew any of them.

M1 Before you went down to Municipal Court, you know, after '77, had Jack been in a lot of trouble?

F1 Oh, yeah.

M1 Had Jack been in a lot of trouble before you were married?

F1 Oh, yeah. (inaudible)

M1 Would you tell us a little about it?

F1 About once a month or every three weeks he got picked up on a DUI.

M1 Can you cite some specific instances?

F1 You mean the whereabouts?

M1 Where and what happened, just briefly.

F1 Okay. — one time he hit a car, a parked car, and they took him in that night. The date I can't remember, it happened so often.

M1 Was that when you were married?

F1 Yeah, it was after.

M1 Which court did you go to?

F1 Hamilton Municipal Court.

M1 Do you remember what happened?

F1 Yeah. Jack had me call—this was before Jack knew that I had—suspected that I had talked to Billy on the side and that

M1 Why?

F1 Because I let it slip one time about knowing Billy. My brother got arrested for, what do you call it, not paying child support, and me and my father went there to get him out and that's when I first met Billy. When I first started talking to Billy and Billy told us not to worry that it would be alright, that he would see that my brother didn't go to jail or nothing. So one word led to another and that and then finally he said that anytime you need a favor call me. So, I called him and told him that Jack got picked up on DUI and that if he could take care of it and he said yeah and I think at the time that it cost like a couple hundred dollars.

M1 Was that for fines?

F1 (can't understand)

M1 You gave the money to Billy?

F1 (made sound for yes) Always to Billy.

M1 Okay, now.

F1 He'd always have us come up, you know, before, like at 8:00 in the morning, between 7:00 and 8:00 in the morning, before anybody got in there.

M1 Did he ever show you any paperwork or did he ever show you any

F1 He would just tell me and Jack, most of the time I went up at first, myself and Jack started thinking that me and Billy had something going so Jack started getting in the picture and going up there which was fine with me, but, huh, he would just say, Jack I'm going to write this, you know, I'm going to put this — control or we're going to leave it off the record. Jack went through a lot of DUIs that were never put on his record.

M1 Okay, now, in other words, the two in '81, I guess you weren't married to him in '81

F1 No

M1 He was arrested twice in '81 that we know of. Were you involved in those?

F1 Oh yeah.

M1 Okay, and you say other than, what you're telling me then is that

F1 Jack's had so many DUIs

M1 In Hamilton Municipal Court

F1 Oh yes

M1 That have never gone on the record?

F1 Oh, yeah

M1 Why not? Why didn't they go on the record?

F1 Cause he was paying off this judge and Billy New was paid off.

M1 Now, was anybody else ever present when you went up there with Jack?

F1 No, but Jack's mother knows about it. She's got, you know, she's got it written down in her checkbook and her savings book each time she went and withdrew money and what it was for.

M1 Well, does she go with you on most of these occasions or were there a lot of them

F1 No, she would send me

M1 She would send you?

F1 (Made sound for yes) (inaudible) and she'd be at work or something.

M1 Well, when you say Billy New was there anybody else in the office at the time, where the girls in yet?

F1 No. It would just be Billy and sometimes James Dolan would be there.

M1 But none of the secretaries were in and the prosecutor wasn't in?

F1 No

M1 The court wasn't in session?

F1 No. Like I said it would be between 7:00 and 8:00 in the morning

M1 What did you have to do? Knock on the door?

F1 Yeah. He'd always tell me to either call him to make sure he'd be waiting at the door and knock on the door. He'd usually be standing there waiting (inaudible) money

M1 Okay. And anytime that he came in before, uh, anytime that you went down there before the girls would come in or anything like that, did they ever give you any paperwork for the money you gave him? Did they ever give you a receipt?

F1 No. The only time were receipts were passed out was, uh, Billy would take, uh, like Jack's mom went one time and Jack went a couple times up there and, uh, he would take and give both a little slip of paper or something saying that this is the case number, you know, it does not mean nothing but, you know, just in case something comes back you've got this piece of paper for some of the money but not all of the money.

M1 Okay, so in other words Jack, the times that Jack went up, Jack would give money to Billy New and Billy would give him a receipt for part of the money.

F1 (Made sound for yes—uh huh)

M1 But never the full amount?

F1 Oh no. Never. No, because I'd always ask him, Billy, how much is this going to cost and he'd say, I'll tell you what, if the fine was going to be like \$100-\$150 he'd say anything up to \$300. Because he'd said, you

know, he had to make something because he came in early enough to take care of it, etc., etc.

M1 Did he ever, did Billy New ever, explain to you how he was tampering with the records? Did he ever explain to you how he did that? The procedures?

F1 No, he really didn't. But, I said, you know, I called him lots of time at night and he'd say give me a few minutes—I'd call him at home and I'd say so and so is going to go to court tomorrow, Billy, can you do something for him. And he'd say, well give me a few minutes to get up the courthouse and call me up at the court and I'd call him and he'd pull whoever's record it would be at the time and then he'd say, well have them up here at 8:00 in the morning with such and such money.

M1 Did you ever go with anybody else besides Jack?

F1 Oh yeah.

M1 And this was before the secretaries came in? The same kind of deal?

F1 Oh yeah. The same kind of deal.

M1 Can you give us any names or can you think of

F1 There was Jerry Day. He was for a DUI. There was a, I think his name was, James Smith and he was, it was his second charge of concealed weapon and that. They picked him up the Jackpot, I remember, for having a gun, for borrowing a gun. It was his second offense for concealed weapon and I called Billy and Billy took, he even, even the man couldn't believe it cause it came out in the paper that, like, he was only fined \$50 and the court costs and suspended jail sentence, blah blah this and blah blah that and Billy took, I think, \$300 off of him and he was highly teed off.

M1 Okay, so when you took the man up there he thought that the money he paid was paying the fine so he didn't know the scam.

F1 No. No.

M1 Now, did you ever get any money for that?

F1 No. Billy always told me—he said that if you bring anybody up here you want to charge them more,

let me know ahead of time and he said, I'll quote that price in (inaudible)

M1 But you never took any. You were just doing it as personal favors for your friends.

F1 Yeah. You know, and family. Friends and family.

M1 Were you pretty comfortable with it? I mean, did you, were you ever uneasy about it at all?

F1 Like when it came to family, you know, nobody wants to see their family go to jail or that and I thought, you know, that it was alright, you know, because anybody looks out for their family and like I said, nobody wants to see their family go to jail or that and then, you know, I got fed up with it one day because I thought well, (?) could happen to me, you know, when I got, like I told you, I got busted on that petty theft in Fairfield and when I went to Fairfield court, they liked to throw the book away with me and I said, well shut, this ain't right. You know, all these other people, if you got money you can pay your way out of it. So, right then and there

M1 The petty theft went down to Fairfield? Right?

F1 Yeah, I got busted in Fairfield

M1 and Billy couldn't do anything for you down there, could he?

F1 He was supposed to have gotten hold of the prosecuting attorney and they were supposed to be the best of friends.

M1- You didn't give him any money to help you, though, did you?

F1 No. He never asked me for no money. He just sent me to Jack Garretson. He told me that he would get ahold of Jack Garretson and I said, how much is this going to cost Billy, and he said I'll just give Jack a \$100 to (inaudible—can't understand)

M1 Billy would give Jack \$100 or you would?

F1 No, Billy told me that he'd set it up with Jack and that it would only cost me \$100

M1 Oh, I see

F1 for Jack to represent me

M1 Okay, now, other

F1 *That's who* Billy sent Jack to, I don't know if it was this last DUI, I think, it was Jack Garretson who Billy sent Jack to.

M1 Jack Schriefer?

F1 Yeah. John Schriefer.

M1 John.

F1 I always call him Jack. And then I think his name is Bert Infeld who he sent Jack to because he said they were friends with his And then there was several petty theft charges people that got picked up on petty theft charges and he'd say just bring them up here and bring \$100-\$150-\$200, you know, whatever it might be, (she may have said—you never know what it might be) or ever how much he thought the people could come up with.

M1 Did you, um, how many, on how many occasions do you imagine, just roughly guessing, did you go up there, you know, to take people? Just guessing over, say, the last three years. How many times do you think you went up?

F1 At least fifty

M1 Fifty times before court opened

F1 If not more. It was an everyday ordeal practically. People were calling me from all over. From all over this town.

M1 How did they find out about you? Just from word of mouth?

F1 I guess (laugh). I'd say, hey you know, all I'd do is call Billy New and he'll get you out of it. And I'd call Billy and he'd say bring such and such money up here and I'd take the money and go up there.

M1 Well, now,

F1 And like I said all the, what he would do, like, uh, I'd call him that night and he'd go in and pull the records and he'd say, yeah I can take care of it for you

and none of the people would ever have to go in front of the judge and Judge Dolan would be sitting there and he knew what was going on.

M1 How do you know he knew?

F1 Cause he'd be sitting right there. Billy'd say I'm going to do this

M1 Did Judge Dolan see Billy take the money?

F1 Of course he did.

M1 And the cash registers—he didn't go to a cash register or anything or make any kind of tape on it or

F1 No, because one time Jack's mother went up there, when the fine, well Billy called it the fine, was going to be like \$1500 and Jack's mother took his check up there

M1 Was this last time

F1 and Billy got, No, no. No.

M1 Okay

F1 This is a time when it wasn't even on his record.

M1 Oh. This is one of the cases that never even appeared on his record.

F1 (Sound for yes—uh huh) and Billy got real upset and he said I told you whenever you bring anybody up here make sure they had cash money. He said, now, he says, court people are going to start coming in here, you'll have to wait to take care of this tomorrow. He got real upset because she didn't have the cash money.

M1 Was she with you that time?

F1 She was with me that day. She got real upset. She couldn't understand and I said well, Mom, don't say nothing, I said, cause what it is a payoff deal. I said, you know, he has to deal strictly with cash. So she went and got it

M1 So Helen knew that then. Helen knew how it was being worked?

F1 Of course she did.

M1 What year was that? Do you remember? Was that in

F1 Like I said, it was one time it wasn't on the record, you know, that it didn't show up on the record.

M1 Was it when you were married? Or was it after you were married?

F1 I think it was before we were married, maybe. No, it was after. It had to be after, I guess, cause he didn't come into office until mid 1978. I guess we were, either we were married or moving(?) back and forth, I guess. Because, like this last time when there was almost \$4000 involved I told Jack's mom, I said, you're just going to keep it up. I said each time they're going to go up higher and higher on you cause they know you'll give them the money and I said, you know, I've never heard of anybody paying that much money.

M1 Well, now, the last time Jack went down, he actually did go into court, didn't he? The time he had the drug abuse charge and the obstructing official business/

F1 That was a long time ago

M1 No, that was in '82. This is the one I'm talking about, in March of '82.

F1 He's had one since March of '82, honey.

M1 Oh, he has?

F1 He's had to. Because when he got picked on that charge that he paid down all that money, it was before, I guess, then. I'm trying to think. It was before or after. Because when he got picked up, when she paid all that money this last time, I guess it was the last time, because Jack got upset because that's when Billy and them heard that people were talking that he was scared to give Jack his license.

M1 Now, how do you know that Billy heard that people were talking?

F1 Because Jack, he told Jack to be up there that morning to get his license and then when Jack went up there he told Jack that he's have to wait, that there, that he would send him to Fairfield Court and have a lawyer represent him in the Fairfield Court and that they'd go down there and go before the judge and get his license.

M1 Okay, so Billy told Jack that tape ended and some conversation lost changing from side 1 to side 2

side 2 begins with F1 speaking

F1 (cannot understand what is being said)

M1 Alright Patsy. On these occasions that you went down to the court early in the morning did you always go in the same door?

F1 No.

M1 Okay, would you, what

F1 I would go in different doors. It all depended on which door Billy wanted to go through. Like sometimes we'd go through the first doors — where the prosecuting attorney, where you make out your warrants and that, go into the chambers that way. We'd go straight

M1 When you say, go into the chambers, what do you mean by that?

F1 Go into Judge Dolan's chambers.

M1 You would actually go into Judge Dolan's chambers?

F1 Yeah. I've went into Judge Dolan's chambers

M1 Where he has his desk?

F1 several times. Oh yeah, I've sat at his desk before. (laugh)

M1 When he was in there?

F1 Oh yeah.

M1 And, did you ever transact business in his chambers?

F1 Yes.

M1 Just describe that briefly.

F1 Like, we'd go in and James Dolan would be sitting in his office, or something like this, as Billy must have been in there talking to him before I got there or something. We'd go in and Billy would say, Mr. Dolan, Patsy's up here to take care of this case such and such, I talked to you about it earlier or I talked to you about it last night and James Dolan would always shake his head yes (couple words—can't understand)

M1 Now, these times when you came into Judge Dolan's chambers to discuss the case with Billy, did the person who was actually charged come with you?

F1 No, not when I went in and talked.

M1 Now, did they usually go to the courthouse with you though?

F1 They would go, only some people would go and you know, it's, like, Billy would tell me ahead of time how much it was going to be. Billy would always tell me

M1 Give a few examples of that, if you can think of any.

F1 Okay, like on James, I think his name was James Smith, uh, when he was charged with carrying a concealed weapon and that, like I called Billy New on the telephone and I said, Billy, this guy's in trouble, it's his second time and I said, he doesn't want to go to jail and now how much will it cost and Billy said call me back later and I'll talk it over with Dolan and he called back and he said bring me up \$300 and bring the guy too because he says we got to take and let him know what we're going to put on the record and he said we're going to put down 30 days, I think it was 30 days, or more than that probably, I forget how many days because there's been so many times, suspended and \$50 fine and that's when that guy blew up and his mother did

M1 Who was it that blew up?

F1 The guys mother because he had to get the money off of his mother. He's an older man and he's an electrician but he's a drinker, he drinks a lot. And I told him, I said, you know, this is called a pay-off.

M1 Okay. He knew that before he went down?

F1 (made sound for yes) Because he just didn't want to go to jail.

M1 Okay.

F1 Like you said, he didn't care how much money it was involved, he didn't want to go to jail and so I told Billy, I said he's a friend of mine and Billy said bring him down with \$300.

M1 Now, when you would call Billy with different cases did you usually more or less introduce it by saying, a friend of mine is in trouble?

F1 Oh yeah. I'd call him and say, Billy, this is Pat. He'd say, how ya been, you know, and he'd talk with me and I'd say I need a favor and he'd say, what is it, and I'd say, so and so has done this and they're going to court and they don't want to go to jail. How much would it cost to get them out of it? And he'd either quote me a price right then or have me call him back because he'd say he'd have to go over it with James Dolan.

M Okay, now, Patty, you've told us that you've been into the Judge's chambers by way of going in the front doors of--Municipal Court and then through the other double doors and then the first door that you get to on the left as you walk in there, there is some girls' desks, and eventually leads you back to Billy's offices and you've been in Judge Dolan's chambers that way?

F1 Oh yes.

M Is there another entrance to Judge Dolan's chambers?

F1 Right. You can go in and there's a door that we all that unlocks and you just walk right into his chambers.

M So that we'll know this later, do you mean that as soon as you come in the first outer door from the outside through parking lot as soon as you get in that first outer door the door on the left.

F1 The door on the left.

M And that's locked from the outside and if it is open that's Judge Dolan's chambers

F1 Yeah, because the first time I went up there I was really, you know, really excited and that, and I said, wow, I said, I can't believe I'm in Judge Dolan's chambers like this. He got a big kick out of it cause (name) was sitting there at the time.

M But he would know just about precisely when you were going to be in there.

F1 Oh yeah, I'd either call

M I mean, you would say you were going to be up at 8:00 a.m. sharp

F1 Right and at 8:00 a.m. I'd be there.

M If his door would be locked, would you knock on the door and or would

F1 Sometimes I would knock or, most, 90% of the time, Billy would be standing near waiting for me.

M And, on how many occasions, would you estimate, at 8:00 in the morning and thereabouts on court mornings that you went into Judge Dolan's chambers in that fashion? Roughly, take a guess.

F1 You mean just into Judge Dolan's chambers and not into Billy New's office or do you mean

M Right, just into his chambers. That way, through that door.

F1 Just the one door

M The one that's locked from the outside

F1 I'd say I've been through it at least ten times.

M And of those ten times that you did enter into it that way, how many of those times were Judge Dolan sitting in his chair, would you say?

F1 Over half. I'd say at least five.

M Okay. And, on the occasions he was there, you were there and Billy was there what would be said, if anything regarding what you would be doing there?

F1 Billy would always tell him that I was coming up there on a case and he'd say, remember I talked to you about this case last night or yesterday and Dolan would always say yes.

M And then, in your presence and in the presence of each other, they would then decide what they had decided with the case and someone would mark it up right on the case what they were going to do.

F1 Right. Right. It would be marked right then and there, you know, that the people that were supposed to being to court wouldn't be there and they'd take care of it right then and there

M And then the money that you had agreed to pay previously by talking with Billy, where and when would you pay him that.

F1 Right then and there. I'd just hand it to him. I'd just say, you'd say that was going to be such and such and he'd say yeah honey and I'd just (inaudible—a couple words)

M What I specifically need (or mean) is if you saw them marking on the case or if you (couple words—can't understand)

F1 I'd always give them the money first. They'd always want the money up front. And then they'd mark the case. You know, like

M Okay, but the money was, uh, you know, Billy said that would be \$300 or whatever it was going to be for the (couple words—can't understand)

F1 (Sounds of agreement)

M and at the same time that that was done or shortly thereafter they're marking the case (couple words—can't understand)

F1 (sounds of agreement) right then and there.

M And obviously what I'm saying (can't understand) that there's no doubt in your mind that you were in their presence

F1 Oh, they've *pocketed* (sounds like) the money

M I mean, that they, that Judge Dolan was in a position to know or hear what you had just given Billy

F1 Oh yeah, he knew

M and he likewise knows what was put on the case

F1 He would know because Billy would say, uh, Mr. Dolan we said this would be \$300, we said this would be this much, we said this would be that much. They both knew what was going on. Nothing confidential.

M In any of the times that you were ever in his chambers did it ever turn out that any of the girls came to the office early and they had seen you in there?

F1 No. No.

M When you would leave his chambers on those occasions where you either went in directly through the locked door around did anyone ever see you come out of there, as far as you know?

F1 There was a couple mornings that I'd be late and the girls would be out front or something and Billy would just walk me right back to his office and we'd made transactions right then and there.

M But, so,

F1 As far as anyone seeing me come out of the Judge's chambers, no because it would always be early in the

M But you would be sure in your own mind that at least some of the girls in Hamilton Municipal Court would recognize you by your face very easily.

F1 Oh, Lord, yeah.

M1 Do you know any of those girls by name?

F1 No I don't but I know they know me by being there so much.

M1 You mentioned in the connection with Jack Schriefer that there were a lot of cases that you took down and made payoffs that never went on the record.

F1 (sound of agreement)

M1 Now, to the best of your recollection, did any of those, were any of those deals, ever made in the Judge Dolan's office?

F1 Yeah, there was one made in Judge Dolan's office.

M1 Where is absolutely didn't even appear on the record?

F1 No

M1 So they didn't, in other words, they didn't mark anything on any file that time?

F1 (sound of agreement)

M1 How did they take care of it, or what was their

F1 Billy told me not to worry about it, that he'd take care of it.

M1 So you just gave him the money and that was it.

F1 Right, that was it.

M1 Was Jack there with you that time?

F1 No. Billy was afraid of Jack because Jack blew up at Billy one time, he said, man, I know what's going on, many, he said uh, you're taking and getting payoffs man, he says, you know, he said, I don't care how much money it costs, you know, I've always come (can't quite make out a couple words, possibly be—through it) before and he says, I know what you're doing Billy. Billy got real upset with Jack.

M1 Why did Jack get mad at Billy?

F1 Because Jack went up there without me trying to make a transaction with Billy and Billy wouldn't do it.

M1 I see, so Jack was trying to make his own deal.

F1 Right, and it wouldn't go over.

M Why do you come to the conclusion that there were times he had DUIs that never appeared on the record? Why do you come to that conclusion?

F1 Because I'd go to jail and get him out with his mother

M No. I know that, but what makes you think that it wasn't marked somewhere in Hamilton Municipal Court records?

F1 Because didn't you say that he only had two DUIs on his record in Hamilton Municipal Court (few words—can't understand) since when?

M He had two in 1981 and I think he has one in 1982 and there may have been some before that, but I mean other than the fact of us telling you what we might know from the record

F1 Well, because the times I went up there I know for a fact

M1 How many times have you gone up with Jack, would you say, since '82, or since '81, pardon me?

F1 Since '81?

M1 Yeah, how many times have you, just with Jack?

F1 Just with Jack alone?

M1 Or on Jack's behalf?

F1 I'd say at least seven or eight times.

M On DUIs?

F1 (sound of agreement) On DUIs. Cause he got two of them in one week's time.

M He got two DUIs in one week's time.

F1 Two DUIs in one week's time.

M Now did his mother go, did you always go down to bail him out or was he actually, was he put in the lockup?

F1 Yeah, he was sitting in the lockup

M And his mother would go down

F1 Yeah, and he'd be allowed one phone call. He'd either call me or his mother and if he called her then she'd call me and she'd say, Pat can you go with me, Jack's in jail again. That's why I can't understand because the police would arrest him, there would be a citation given. If Jack hasn't thrown them away I can bring, I can go down there and I can get them and prove that and I had a couple of his tickets and I hope I still got them, but down in Jack's drawers, Jack's got a stack of tickets you would not believe. And they're the ones for DUIs ran through Municipal Court.

M So,

F1 Cause he got a kick out of it

M To repeat then, you have been since the beginning of '81 to the best of your knowledge, you have been down to Hamilton Municipal Court on at least five or six

F1 Oh, yeah

M different occasions for Jack

F1 For Jack alone

M Okay. Now, did Helen go with you that many times or did

F1 No, any time she knew there was going to be transaction and that, just that one time, she got real upset because she took a check. She took, she went to the bank and got a certified check and

M They wouldn't take it

F1 They wouldn't take it. No. Absolutely not.

M1 There was supposed to have been a xerox copy of one of the checks that Helen had made out to Municipal Court. Is that the one you're referring to? Or do you remember anything about a xerox or did you ever

F1 That must, that was on a — case when Jack — hit a car.

M1 On a what case?

F1 (It sounds like she's saying—Holland)

F1 He hit a Holland.

M1 Motor freight?

F1 No, the peoples name was Holland.

M1 Oh, I see

F1 And, uh, that was when she took a check up there.

M1 Now, was the check, uh, was the purpose of the check to pay the people for the damage done to the car?

F1 I think that check was, yeah, because the people couldn't understand why Jack wasn't going to jail or why he wasn't, you know, going to court and that.

M — for restitution partially?

F1 (sound for agreement)

M1 What year was that? Do you remember? Was that one of the '81 cases?

F1 No, I think this was in '78 or '79.

M1 Now, had you ever had an occasion to make a payoff to Billy New anywhere other than in the court? Have you ever met him anywhere else to exchange money?

F1 No

M Did you ever go up there after court hours in the evening?

F1 Oh yeah. I've been up there before. I've went up there at night, 10:00 at night once.

M Talking about a case?

F1 Talking about a case and paying Billy for a case.

M You would meet him up there?

F1 (sound for agreement)

M You'd just agree to meet him and he'd open up the door

F1 Oh yeah. Even on a Saturday and Sunday

M Turn lights on and the whole thing

F1 Yeah, even on, I've been up there on Saturday, Sunday, all through the week, in the evenings, yeah.

M1 Were these on cases for Jack Schriefer and can you think of any other names, I know you've given us the name of the C.C.W. case.

F1 (mumbling—inaudible) There's been so many in between and that

M1 You mentioned the name Tirey

F1 Yeah, Don Tirey. Now his father would take care of his and (it sounds like—Otis) Tirey is good friends with Billy New and he always took care of that himself, but I know that he was supposed to have

"THE PEOPLE HAVE A RIGHT to demand that their safety and welfare be protected at all times. This can only be accomplished by the fair, consistent application of the law. One must take responsibility for his or her own actions."

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DEFENDANT'S EXHIBIT C

September 27, 1983

Mr. Jeff Landreth
Public Safety Director
City Building
Hamilton, Ohio

Dear Mr. Landreth:

I have been personally made aware of conversations and events pertaining to the operation of Hamilton Municipal Court which, if true, constitute criminal activity.

Such conduct pertains to the activities of former Director of Court Services Billy J. New.

The subject matter of such conduct involves a scheme wherein the former Director of Court Services, Billy J. New, accepted monies from defendants through an intermediary for the purpose of disposing of cases in a manner not provided for by law.

I was further told that, on some occasions, this intermediary made transactions with Billy J. New on behalf of various defendants in the presence of Judge James H. Dolan.

As an attorney and officer of the Court, having been made aware of these allegations, I believe it my legal obligation to inform the proper investigative body.

Respectfully submitted,

/s/ Daniel E. Connaughton
DANIEL E. CONNAUGHTON

DEFENDANT'S EXHIBIT D

To the Editor:

It is now common knowledge that I filed a formal complaint which began the investigation leading to bribery charges filed by the Hamilton Police Department against Billy New. Because I filed the complaint at this time, a charge of "dirty politics" has been levied against me by some members of the community. It is understandable that those not close to the events which led to the complaint, without further information, might reach the conclusion that my actions were purely political. Those same people probably also assume that I possessed this knowledge for months, even years, and simply waited until the most politically advantageous moment to release it. Nothing could be further from the truth.

I trust that by reporting the chronological chain of events leading to the complaint, the issues raised will be laid to rest.

As in any judicial election, an incumbent runs on his record. In examining my opponent's record regarding drunk-driving cases handled during his term, several members of my committee came in contact with an individual involved with one of the cases they were checking.

On September 17, 1983, I met with this individual. Prior to September 17, 1983, I did not know this person, nor had I known any of the information I was then told. During this meeting, some very serious allegations surfaced concerning the operation of the Hamilton Municipal Court. Yet, before filing a complaint, I took great precautions to ascertain the validity of the information. When I was satisfied I was being told the truth, I sought the collective advice of the City Law Director, the Director of Public Safety, and the Chief of Police. I was advised by them that a formal complaint needed to be filed to initiate a police investigation.

On September 27, 1983, I filed a formal complaint. On September 28, 1983, I released all the information I had to the Hamilton Police Department. Thereafter, as in all police matters, they conducted their own independent investigation. On October 3, 1983, Mr. New was charged with three counts of bribery by the Hamilton Police Department.

Since Judge Dolan has stated publicly that, on September 21, 1983, he had heard a rumor serious enough to warrant demanding his Clerk's resignation, why, at that time, didn't he take the steps necessary to institute an investigation into alleged misconduct?

I have honestly reported the facts in this matter. I defend the action I took. My suggestion to those who still cry "dirty politics" is to re-examine their own sense of moral and legal responsibility.

/s/ Daniel E. Connaughton
DANIEL E. CONNAUGHTON
Municipal Court Judge Candidate

DEFENDANT'S EXHIBIT E

VOTERS WILL NOT BELIEVE
NEW CHARGES NOT POLITICAL

EDITOR:

My opponent, in his letter to the editor (Readers' letters, Oct. 20), says that he had no political motive in his timing of a complaint in September 1983, regarding the claimed conduct of the former clerk of Hamilton Municipal Court in 1981 and early 1982.

He claims that he is not guilty of dirty politics.

Baloney!

The voters are far too intelligent to believe that.

James H. Dolan
Judge
Hamilton Municipal Court

DEFENDANT'S EXHIBIT F

ATTEMPT TO TRIP JURY,
CONNAUGHTON CONTENDS

By JEANNE HOUCK
Journal-News Writer

Hamilton municipal judge candidate Dan Connaughton said Thursday he feels charges made against him by a bribery case witness were a deliberate attempt to undermine the efforts of the Butler County Grand Jury.

Connaughton opposes incumbent municipal Judge James Dolan in the Nov. 8 election.

Connaughton's remarks were made in his Fairway Hills home at a press conference he said he called to respond to charges, reported in the Nov. 1 *Journal-News*, made by a woman called to testify before the grand jury in the bribery case of Billy New, former director of municipal court services.

Alice Thompson, 22, 1740 Shuler Ave., currently unemployed, told the *Journal-News* that Connaughton offered her and her sister, Patsy Stephens, 32, 1757 Shuler Ave., jobs and trips in return for help in providing information about New.

As reported in the Nov. 1 article, Connaughton denied attempting to make such offers to the women.

He said Thompson misinterpreted small talk about possible jobs and a trip to Florida.

"It is perfectly clear to me that there has been a deliberate attempt to undermine the efforts of the grand jury by a well-placed and well-orchestrated campaign to discredit me," Connaughton charged.

Asked who was behind the campaign, he said Thompson was.

Asked whether he believed she was capable of mounting such a campaign alone, he replied, "I believe she has help," but declined to offer any names.

Connaughton said it is apparent Thompson is receiving legal help, because she told him her lawyer had advised her to take the Fifth Amendment—refuse to testify on the grounds that it could incriminate her—if she appeared before the grand jury.

"She doesn't know the difference between the Fifth Amendment and the Fifth Commandment," Connaughton contended.

Thompson originally told the *Journal-News* she was represented by Matt Crehan. After the story was published, however, both Thompson and Crehan denied he was her lawyer.

"I wouldn't be surprised at all if she never did testify before the grand jury," Connaughton added.

Butler County Prosecutor John Holcomb said Thursday he cannot make public whether Thompson testified before the grand jury. Grand jury proceedings are secret by law.

"It would be improper for me to make a comment about the case itself," Holcomb said, "except to say that although the grand jury was probably aware of the contents of the article which appeared before the case was over, I'm positive that it did not influence them one way or another in their deliberations.

He said the grand jury spent the "better part" of Monday and Tuesday hearing the case.

Connaughton said Thompson's charges that he used "dirty politics" to gain information about New in an attempt to smear Dolan were "outrageous and unfounded."

"I hereby categorically deny them," he said.

He said meetings with the two sisters took place in a relaxed atmosphere in which many things were discussed, but no type of "inducements" were offered in return for information.

"There is no question but that the fact that certain words or key phrases have been mentioned—Maisonette, going south—but I do know that these were never, ever done in the form of an inducement," he said.

Connaughton said that the first time he met with Thompson and Stephens was Sept. 17, as he had previously stated in a letter to the editor published in *Journal-News*.

Connaughton said Thursday that his wife Martha met Sept. 8 with June Taylor, state coordinator for MADD (Mother Against Drunk Drivers), who told Martha Connaughton about experiences Stephens had had with municipal court.

He said information provided by Stephens was much more important in prompting him to file an official complaint concerning New, which led to a police investigation and his arrest Oct. 3.

Connaughton also said Thompson did not refuse a lie detector test he arranged—as she told the *Journal-News*.

He said after a Cincinnati polygraphist Sept. 22 determined that Stephens had passed the test with "flying colors," Connaughton decided not to ask Thompson to take the test.

"If I made one mistake it was maybe I should have called her (Thompson) as a matter of personal courtesy before I filed the official complaint," Connaughton admitted.

He said he had promised the two anonymity "in so far as I had control."

Connaughton repeated the contention he has held throughout the matter that he did his civic duty in filing charges against New, and said, despite the anguish it has caused his family and campaign workers, he would do so again.

DEFENDANT'S EXHIBIT C

GRAND JURY INDICTS BILLY NEW

By PAM LONG
Journal-News Writer

The former director of court services in Hamilton Municipal Court was indicted on five counts of bribery by the Butler County Grand Jury today.

Billy Joe New, 52, 960 Foster Ave., was indicted on four charges involving money and one charge involving "favors of a personal nature."

None of the persons allegedly involved were indicted.

The grand jury indictments state that New was corrupted or influenced in his duties when he asked or accepted:

- \$210 from Jerry Day on Nov. 25, 1982;
- \$205 from James Smith Aug. 19, 1982;
- "favors of a personal nature" from Sheila Charles April 16, 1982;
- \$210 from James Harris March 25, 1981;
- \$335 from Alice Thompson Feb. 18, 1982.

Thompson was the only grand jury witness to receive immunity at the request of the prosecutor, said Butler County Common Pleas Judge John Moser, who granted Thompson immunity.

Thompson told the *Journal-News* she had taken the Fifth Amendment, which allows a witness the right to not testify on the grounds the testimony may incriminate the witness.

Asked to define "favours of a personal nature," Butler County Prosecutor John Holcomb said, "It's sure not talking about two tickets to a baseball game."

Holcomb also issued a statement when the grand jury returned its indictments.

"Other than what is included in the grand jury report, it is only fair to point out that, in the opinion of the prosecuting attorney, the evidence before the grand jury failed to implicate anyone in the Hamilton Municipal Court in any illegality, including Judge (James) Dolan, nor did the evidence indicate any illegality of (Hamilton Municipal Judge) candidate Daniel Connaughton in the possible inducement of a witness to give testimony," Holcomb's statement said in part.

Holcomb also indicated both Connaughton and Dolan appeared as witnesses before the grand jury and were given "wide latitude to testify without limitation."

"After each candidate testified, both said they had treated with courtesy and fairness by the prosecuting attorney and the grand jurors," Holcomb said.

The grand jury proceedings are kept secret and testimony is not public record.

Holcomb said he did not make any recommendations or suggestions to the grand jury on how to deal with the case.

"The grand jury did not concern itself with possible political implications and apparently decided to let the chips fall where they may just as in any other case and report on the first Friday of the month just as Butler County Grand Juries have done each month for most months of the past 11 years," Holcomb said.

Holcomb also said there would be no further comment on the case until after Nov. 8, which is election day.

New was the director of court services under Hamilton Municipal Court Judge James Dolan for almost six years. Dolan asked for and accepted New's resignation Sept. 22. Connaughton filed a complaint against New Sept. 27. New was arrested Oct. 3 on three counts of bribery, involving Day, Smith and Thompson.

DEFENDANTS EXHIBIT H

JOURNAL NEWS
PAGE OF OPINIONS*In our opinion—Hamilton Municipal Court*WINNER MUST RESTORE PUBLIC'S
CONFIDENCE IN COURT

(EDITOR'S NOTE: The *Journal-News* usually completes publication of its endorsement editorials no later than one week before the election. But this editorial, because of unusual circumstances involving the contest for Hamilton Municipal Court, has been delayed until additional information could be considered.)

The two-man contest for judge of the Hamilton Municipal Court has dominated the 1983 campaign in the area, particularly in the closing weeks.

That is why most readers are familiar with many of the details of the intense ballot battle between Judge James H. Dolan and Daniel E. Connaughton, the challenger.

The winner—who will be paid \$55,750 a year—will serve a six-year term on the court which covers the City of Hamilton and adjacent communities in Ross Twp. and St. Clair Twp.

Voters in those areas will have a chance to participate in the decision between 6:30 a.m. and 7:30 p.m. Tuesday.

Dolan, 65, has been practicing law for 27 years and has been municipal court judge since Jan. 1, 1978. Dolan has stressed his record during nearly six years on the bench.

Connaughton, 40, has been practicing law for 14 years, including two years as city prosecutor and two years

as assistant county prosecutor, both part-time positions. He also has been an acting judge.

Connaughton said if he is elected, changes can be expected, particularly in the pre-trial system.

As usual, both candidates also claim to have all the personal virtues desired in a judge.

Of course, a major complication in the campaign has been the bribery charges pending against Billy J. New, a former director of court services during Dolan's tenure.

In light of the New case, Connaughton has questioned the administrative ability of Dolan. The judge has responded by noting that New is a former employee who resigned Sept. 22 after questioning by the judge.

A Butler County grand jury heard the New case last week. It returned indictments against him Friday morning.

Of course, the indictment is only a step in the legal process, not a judgmental or conclusive action. New hasn't been tried in a court of common pleas, and is presumed innocent until proven guilty.

It also should be emphasized that there are no charges against Judge Dolan, nor are any likely on the basis of present information.

Despite Dolan's close association with New, there are no indications that the judge has been guilty of anything worse than too much trust of an employee.

In fact, Butler County Prosecutor John F. Holcomb released a statement Friday in reference to the grand jury's findings. It said:

"Other than what is included in the grand jury report (indictments against New), it is only fair to point out that in the opinion of the prosecuting attorney, the evidence before grand jury failed to implicate anyone in

the Hamilton Municipal Court in any illegality, including Judge Dolan, nor did the evidence indicate any illegality of candidate Daniel Connaughton in the possible inducement of a witness to give testimony."

But regardless of the outcome of the New case in common pleas court, there is some reason to question the operation of the court, particularly the absence of adequate checks and balances throughout the system.

The Connaughton campaign has raised some interesting questions about the conduct of the court.

The critical question is if the blame should be borne entirely by Judge Dolan.

Has he neglected supervision of the system, or has his failing been because of one of his strengths—his dedication to and concentration on the fair and expedient handling of judicial matters?

The judge has noted that Hamilton Municipal Court has the second highest caseload per judge in Ohio.

If the system is defective, or open to abuse, shouldn't others who operate within that system and who have oversight on parts of it also share the responsibility?

That includes lawyers who try cases in the court and city officials who are responsible for some of its functions, including the hiring and supervision of the part-time city prosecutor who handles cases in municipal court.

Shouldn't alarms have been sounded earlier if there is a real need for reforms, for an additional judge or court personnel, or for a better system of tracking cases from the pre-trial stage through completion of sentences?

Shouldn't the people closest to the court have urged an objective study of shortcomings and potential trouble spots in procedures, policies and supervision which interfere with justice, regardless of who is the judge?

What has been the result of the campaign—other than to keep the names of the candidates in the forefront?

Has it uncovered (1) a judge who didn't pay enough attention to administrative matters, (2) a local legal profession which has conveniently turned its back on a system in need of repair, or (3) both?

Obviously, that question is a tough one to answer, particularly for those not emotionally or personally involved in the Dolan and Connaughton campaigns.

It has been a difficult task for voters who have no direct contact with the court or the criminal justice system. It also has been tough for a newspaper weighing an endorsement for municipal judge.

That is why the *Journal-News* has taken extra time to examine the candidates, weigh the charges and the innuendoes and consider the opinions of those who have worked with both candidates.

The findings are inconclusive.

Dolan generally is regarded as an honest, hardworking judge who has improved the municipal court system during his term on the bench. Of course, not everyone has agreed with all of his decisions, but that is expected.

As noted, there is nothing to suggest that he has been involved in anything improper.

At the same time, Connaughton is credited with bringing some important questions to the fore, even if at times it has appeared to be more politically-motivated than concern for the efficiency and fairness of the judicial system.

In answer to the charge of playing politics, Connaughton's forces note with some justification that many of their criticisms only come to light in such a campaign.

When a person becomes a candidate, he or she becomes the logical recipient of information, suggestions and complaints about the office being sought.

The process affords the candidate the opportunity to step back and take a deeper, more thoughtful look at the office and its operations.

In summary, a slight edge goes to Judge James H. Dolan—with the admonition that, if elected, he must assume the responsibility for restoring public confidence in the administration of the court.

But regardless of the election outcome, the questions about Hamilton Municipal Court—and all local courts—must not be forgotten after Nov. 8.

The winner in the Dolan-Connaughton contest is expected to do everything possible to improve the accountability of the municipal court.

He also must take the lead in assuring that municipal court decisions are rendered in open court with consideration for crime victims, not just for defendants, prosecutors and lawyers.

He also is expected to lead the way in reevaluating the system, and particularly in eliminating the potential for both administrative and judicial abuse.

DEFENDANT'S EXHIBIT 1

TRANSCRIPT OF INTERVIEW

OF

DAN CONNAUGHTON

CONDUCTED BY

JOURNAL NEWS

THOSE PRESENT:

Mrs. Pam Long

Mr. Jim Blount

Mr. Dan Connaughton

[1] MRS. LONG: Today is the 31st, and that it's about 4:20 in the afternoon of October 31st, and I'm talking to . . . come on in Jim . . . I'm talking to Dan Connaughton, and this is Pam Long.

(Informal conversation, not for the record.)

DAN CONNAUGHTON INTERVIEW—By Mrs. Pam Long:

Q. What I said before is that we have had an interview with Alice Thompson; we were trying to verify the things that she had told us in there, and trying to find out, you know, how much of her statement was true.

A. Okay.

Q. She told us about a meeting that happened sometime in, let's see, early or middle September, around 12:30 a.m. at your house—it would be like, you know, after midnight, at your house, and it was attended by yourself and Dave Berry, and Joe Cox, the Barneses, Martha Connaughton, and Alice Thompson and Patsy Stephens were brought there by Cox and Berry—can you verify any of that?

A. That's all true.

Q. Okay. Now why was the meeting held from 12:30 a.m. to 5:30 a.m.? At least, that's what she said, that it lasted until about 5:30 a.m.

[2] A. Why was it held that long? Is that the question?

Q. That long, and also at that hour?

A. As I recall, they were working at Rinks, or one of those places, and that was when they got off work, like at 12:30: My wife and brother-in-law had seen Patty Stephens the day or two before that—or, I don't know about the date—to ask her about her ex-husband Jack Schriefer, about his contact with the Hamilton Municipal Court involving his multiple DUI cases and why he was—kept receiving his license back, and that sort of thing. In talking to her, it developed that she was a person that was very familiar with Billy Joe New and had had

numerous contacts with him involving various defendants.

Q. Now which one would this be? Patsy?

A. Patsy.

Q. Patty, okay.

MR. BLOUNT: Is her name Patty, or Patsy?

MR. CONNAUGHTON: Well, I think she prefers Pat or Patty. They have her listed down as Patsy, but . . .

MR. BLOUNT: (Inaudible)

MR. CONNAUGHTON: Right. She would prefer the other two.

[3] Q. Okay. So Patty had had various contacts with New at Municipal Court? Is that right?

A. Ummm-hmmm.

Q. Did your wife and brother-in-law, did they go—did they seek out Patty, or how was it that they found out about her?

A. They were furnished Patty's name by June Taylor, who Patty had contacted about a year ago—the year prior to September of '83, or thereabouts, to complain to her—that is, June Taylor—about her husband's treatment, or lack thereof in the Hamilton Municipal Court, and specifically about his driver's license not being taken away and she was fearful about that.

Q. Now Patty contacted June then about a year ago?

A. A year before September of '83 more or less. Maybe a little longer, but I think that's about right.

Q. Also you indicated that somebody was working at Rinks—would that have been Patty, or would that have been . . .

A. I think Patty and Alice; I think they're working together. In fact, I think they both got off at the same time. That was my understanding.

MR. BLOUNT: Was that at (unclear) or at Rinks? Are you talking about the old Rinks [4] (unclear).

A. Well, I think it was a warehouse or something, now wherever that might be, but I'm certain without actually—not picking them up, that they had just got

off work, wherever they did work—I thought it was for Rinks.

Q. But you understood that both of them were employed then, am I right?

A. Yeah, ummm-hummm.

Q. Okay. So did Bob . . . did Dave Berry and Joe Cox pick them up at their house, or their mother's house, and bring them . . .

A. At her mother's house, yes. Ummm-hmmm.

Q. Okay. Now what was the urgency of having the meeting at that hour of the night? I know you said they were just getting off work, but you know, was it something that could have waited until later, or you know . . .

A. I suppose it could.

Q. Uh-huh.

A. I wasn't involved with setting up the timing of the meeting.

Q. Uh-huh.

A. If my memory serves me right, they did go back out and wanted to talk to her some more and she wasn't there, [5] and I'm not sure if through her mother, or with them directly, they decided that they would pick them up after work.

Q. Okay.

A. The night of the 16th.

Q. Okay. So this was September 16th.

A. Before 12:00 o'clock, so it would be September 16th (unclear) when they got there.

Q. Okay. So September 17th then . . .

A. Right.

Q. At 12:30.

A. Ummm-hmmm.

Q. At Dan's. Were there tape recordings made of that conversation?

A. Yes.

Q. How many tapes—meaning how many tape recorders were going?

A. Two sets of tapes.

Q. Can we hear those tapes?

MR. BLOUNT: Are those the tapes that (unclear).

MR. CONNAUGHTON: Yeah, I suppose they were, the Hamilton Police Department has the other set.

MR. BLOUNT: (Inaudible)

[6] MR. CONNAUGHTON: Yes.

Q. But can we hear them?

A. Yes. You know. . .

Q. When can we do that? Like today?

A. Well, I'm only saying this by way of precaution or premonition, for precisely the reason that I have not come out with everything that I know, because there's pending charges—now you obviously know what you can do and what you can't, that's why I've never told anybody including the paper or anybody else about the use or the other information contained on those tapes.

Q. Ummm-hmmm.

A. Because there are pending charges and I didn't feel it was my place professionally that I'm permitted to do that. Now, I don't know how to answer your question except to say, as far as I'm concerned with what you want to hear on there, I've got no problem—you can hear everything you want to hear on there. And as long as that doesn't interfere with the workings that's going on across the street, sure, you can hear anything you want to hear. You can have them. I've got no problem with that.

MR. BLOUNT: It's not our intention to get into the (inaudible).

[7] MR. CONNAUGHTON: Yeah, you just want to listen to . . . yeah, sure.

Q. What are we going to hear on those tapes?

A. You will hear a very long narrative by Patty Stevens telling about her knowing Billy New, how she came to know him, and the relationship that developed later which revolved around her acting as a broker in effect, bringing him defendants accused in criminal cases, mostly traffic, that she would call Billy New about; he

would pull the case, tell her how much money it was going to cost, she would arrange to meet him, usually early in the morning, bring the required amount of money up, give it to him, he would mark the case up and she would leave. The defendant never appeared down there, never appeared in Court, and that was the end of it. And she will say on those tapes she believed this happened at least forty or fifty times—with her.

Q. Did she establish a time period for that?

A. I think she did, and I don't know that I remember it, but my recollection would be basically concentrated from '79 to '82, that would be my best recollection, of the bulk of it.

Q. Okay. What about Alice Thompson's statement (inaudible).

[8] A. Basically, it's Patty on the tape. Alice would choose and say a couple of phrases here and there, and then she went on to tell us about the involvement she had particularly and personally with Billy New, involving her own gifts.

Q. Will we hear the questions that were asked?

A. Sure. Everything's on there.

Q. Was the tape stopped at any point during the interview?

A. I think that it probably was when we were trying to collect thoughts and see what to ask next, or if we thought someone was going off on a tangent, we were just, you know, our minds were pretty well destroyed by what we were hearing, and I'm sure it's fair to say that sometimes along the way the tape was stopped. Changing tapes, or otherwise too. Sure.

Q. Okay. Before we get too far afield here I'd like to find out, is it possible for us to get a copy of those tapes and listen to them tonight?

A. As far as I'm . . . sure.

Q. Okay. Where can I . . . should I go to your house, or what should I do?

A. Well, I think Dave's got them right next door.

[9] Q. Dave's got them—okay. Okay. What was your reason for conducting the interviews?

A. My reason was that it was reported to me by my wife and my brother-in-law that in talking to Patty Stephens, ex-wife of Jack Schriefer, that not only did she know about his DUI cases, but they hinted to me—they had not had that long of a conversation with her—that she was full of all kinds of information that would be tantamount to extremely serious allegations concerning the operation of the Hamilton Municipal Court.

Q. And again, this was because Patty had come to June. . . ?

A. Right.

Q. The year before?

A. Right.

Q. And June was bringing this—brought this to your wife and brother-in-law's attention?

A. That's correct.

Q. And then they went out to talk to—at Zella Breedlove's house, to talk to the family and that sort of thing, and find out what was going on?

A. That's correct.

Q. Okay. Do you know what date that meeting was?

[10] A. When they first talked to Zel . . .

Q. When they first—when they went out to Zella's house?

A. I think it was about September the 8th?

Q. Did your wife talk to you about this afterwards?

A. Ummm-hmmm. Sure did.

Q. Like the whole night, forever and ever?

A. Yeah, until about 4:00 in the morning. Sure.

Q. Okay.

MR. BLOUNT: Was that really the first solid evidence you had on. . .

MR. CONNAUGHTON: That's it. I said in the paper September 17th when I personally became aware,

but about September 8th or 9th is when they told me what they thought she knew and how serious the allegations were.

Q. Okay. And the reason again for wanting to interview Alice and Patty?

A. Well, I wanted to determine if some of the things I had briefly heard were in fact true, and to see what it was all about.

Q. Did you ever say—tell Alice that your purpose was to collect the evidence, present the information to Dolan, get New and Dolan to resign, and then for you to be appointed [11] to that post?

A. That I would present what I had to them. . .

Q. Yeah, you'd get what you. . .

A. And then they would resign and I would be appointed?

Q. Yeah. Or that your intention was to try to—at least—at the very least confront them with the information—was that your intention at all? I mean, in interviewing these people, was to confront Dolan with this?

A. Well, I don't know that I had a firm purpose prior to hearing what they had to say, what I was going to do with the information once I got it. I think it would be fair to say, sometime during those three or four hours that they were there, that I probably made a remark along the lines that I just can't believe what I'm hearing, and, you know, I would think if they could hear what we're hearing, they would probably resign. I mean, I thought the allegation was that serious. But to tell her that—to answer that—and if she's saying that was my announced purpose of what I had them there for and what we were going to do with the information, my answer would be no.

MR. BLOUNT: You didn't tell her you were going to take the tapes to him? And play them for them?

[12] A. No. No. What I might have said is, boy, I'd sure like to let them hear these tapes and see what

they've got to say for themselves, you know, in a fashion such as that.

MR. BLOUNT: In an expression of shock.

MR. CONNAUGHTON: Yeah. Yeah, as I almost fell off of the fireplace. Right.

Q. Okay. And the reason though, getting back to why you taped the thing, was because you knew, in talking to your wife that there were some serious allegations and you wanted it on tape?

A. That's right. That's right.

MR. BLOUNT: Now, you said before that these were the tapes that the police have?

MR. CONNAUGHTON: Yeah, they've got the one set. I told them everything I knew, including the fact that I had two sets of tapes, and they said do you mind giving them to us and I said here they are, and they took them.

Q. But to get back to the question on the deal about New and Dolan's resignation—was it ever your intention, either during this interview or subsequent to it, to use the tapes as an attempt to get New and Dolan to resign?

A. I can only answer this way. After hearing it all, I knew it would be an unrealistic approach, you know, [13] to go down to their office and say do you gentlemen have about an hour, I'd like for you to listen to something, and then saying, oh, well, okay, if you want to accept our resignations, you know, we quit. And you know, that was absolutely impractical and would not apply. I do not deny that during the course of saying a lot of things in total shock and wondering what in the world we were ever going to do with something that was dynamite, I probably said something like yeah, I'd like to go down there and let them hear this and see what they've got to say about it, you know.

Q. As far as the resignation though?

A. Well I probably would have put an add-on and said, you know, Goddamn, after they hear this they ought to just resign and quit, or something, you know, in that kind of a setting and expression.

Q. Did you ever promise Alice Thompson anonymity?

A. That question was discussed, and I was hoping to her, and I told her it would be my intention and hope that she could remain anonymous, yes. But did I promise her anonymity, the answer would be no. Did we discuss it, we sure did, and I expressed to her my desire as well as her desire that she could remain anonymous.

Q. Do you think that she felt that that was [14] a promise? Did she ever refer to it later, as, you know, well I, you know, I . . .

A. I imagine she feels betrayed.

Q. And why would that be?

A. Because she's not anonymous, and she probably felt that my representation, that maybe she could remain anonymous had been a breach of trust to her.

Q. Did you every talk to Alice about getting a job for her in appreciation for her help with your investigation of New and Dolan?

A. No.

Q. Not a waitress job?

A. No.

Q. Did you promise a Municipal Court job for her sister Patty Stephens?

A. No.

Q. Did you offer to have "the sisters go on a post election trip to Florida with you and your family to stay in a condominium?"

A. No.

Q. Did you offer to set up Thompson's parents, the Breedloves, in what is now Walt's Chambers, which you own and lease?

[15] A. Absolutely not.

Q. Why would she say this to us?

A. What was discussed in an off-handed way, the people who own that bar, who we're not very pleased with, their lease expires next September. My wife has the idea that she wants to open an ice cream type shop like Graeters, or some such thing as that, and I heard

her discussing with them that maybe, since Patty had run this Homette Restaurant or something of that nature, that maybe she would help out and participate in the operation of this—whatever you want to call it—deli shop or gourmet ice cream shop. Yes, and I was present when that took place.

Q. And when was that?

A. Well, I don't think it was that night. As I recall, this was a later time that we had seen them.

Q. But that would only be for Patty (unclear)?

A. I guess Alice was there, and the offer may have been extended to her in that fashion, that she could work there or something—I wouldn't be surprised if that was said.

MR. BLOUNT: But that wasn't at your house?

MR. CONNAUGHTON: No, and it had nothing to do with (inaudible) for information or something, it that's what [16] the point of this question is. That's absolutely no, if that's that question. Well, the tape will speak for itself.

Q. Sure. Sure. Okay. But would there be a reason why she would say to us that, you know, that there was, you know, that she told us—okay—the quote that she gave us was, Martha knew that she was unemployed, and that you had supposedly said to her, we'll see what we can do about that, and then later when they were talking about that particular restaurant, Walt's Chambers, indicated that the Breedloves who had some restaurant experience, the mamma and the papa would be doing something and then the girls would be there as waitresses and have a secure job.

A. I am not aware of any conversation to do with their parents being in any way involved. I am aware of a conversation, as I said before, they were talking about it, because they talked about it at great length, how Patty ran her Homette Restaurant and how successful it was and all this, and at that time Martha said I've had this idea for some time if Dan and his brother would

kick out that bar, I would like to own a little, you know . . .

A. Ummm-hmmm. Sure.

Q. And maybe you could have some ideas or work there or something like that, and that's how that came up, but [17] that's all I remember. But as far as her parents being involved, or owning it, or us leasing it to them, no.

Q. What about this post election trip to Florida? Is there any possibility that they were, in an off-hand way, well, you know, you guys want to go, you know, you can go along, or something like that?

MR. BLOUNT: Did you talk about anything like that?

A. Ummm-hmmm. After getting over the initial shock it became a little clearer to me of—kind of how scary this thing was with the information they gave to us, as far as, if their personal safety was at stake, and before this ripened into a police matter officially where they might get protection if that would be required, I do remember in an off-handed way it being discussed or something that they ought to . . . they could go down to Hilton Head or Florida, or something like that, or maybe hide out or something like that, I don't know. But I own no property and have nothing to offer them.

Q. But there was talk about a friend that had a condominium that would be vacant and it was in terms of a full blown trip, you know, you, the Berrys, the whole group going down to Florida and they were welcome to go along. If [18] you're taking a trip like that, they've got their bags packed. They're ready to go.

A. No. The only conversation I remember along those lines was in connection with, if their personal safety might be in question because of going out on the line and making these serious allegations, that they would obviously be thwarted by former friends and other people.

Q. They did bring out the protection and personal safety aspect (unclear) Alice did. She also mentioned

that there was an offer to stay at your house for awhile; she didn't give us a time frame in terms of how long, but we took it to mean in terms of like the Grand Jury and the trial and that sort of thing—was there an offer like that made?

A. I doubt it. That would be so . . . it wasn't by me. I don't know if that was ever discussed as an issue. If it was, it was an off-handed, not meaningful way, because with two dogs and a cat and three kids, I don't have a whole bunch of room over there.

MR. BLOUNT: Did you give them consideration at all? I'm glad to hear that other people have those problems.

Q. Okay. Now talking about the protection aspect. Were you afraid for their lives? Or were you [19] afraid more for the influence of the neighborhood?

A. I wasn't genuinely afraid for their lives except in a general way without knowing any specifics, when these things might surface, obviously certain people would not be very happy. But I didn't perceive them to be in any immediate danger.

Q. I'd like to move to another meeting—unless you have some more questions, Jim?

MR. BLOUNT: No.

Q. This meeting we were told took place the day Billy New resigned, September 22nd.

A. What meeting?

Q. This would be the lunch session?

A. Yeah, the day of the lie detector test.

Q. Yes.

A. Right.

Q. Okay. Good. I'm glad you brought that up. You weren't there . . .

A. We already talked about it.

Q. Oh, you did talk about that—okay. Okay. Now you can share your notes with me in there.

A. I was there.

Q. You were there?
 [20] A. At what?
 Q. At Linda Berry's for the lie detector?
 A. Umm-hmmm.
 Q. Oh, okay, because she didn't even have you down.
 A. Not for the whole thing, but I was there for about forty minutes.
 Q. Okay.
 A. I didn't participate in it but I was standing out waiting for Patty to go in to have her lie detector, and then I had to leave and go to town.
 Q. Just . . . since I . . . do you want to fill me in, or do you want to . . .
 MR. BLOUNT: Yeah, I can maybe save you some time. Was Alice to take the lie detector test?
 A. It was anticipated that she would, that's why they were both there.
 Q. Ummm-hmmm.
 A. But for reasons I'm not sure of, because I left, once he got through interviewing Patty, and I'm not sure how the collective decision was made, but she was not given the lie detector test.
 MR. BLOUNT: (Unclear) I only knew of one [21] person.
 A. Right. And I don't know. Maybe they got an oral opinion from Mr. Anderson at that time that seemed to satisfy them. I don't know.
 Q. Mr. Anderson?
 MR. BLOUNT: With the lie detector.
 A. He was the examiner.
 Q. What's his first name?
 A. Carl.
 Q. Do you know how to spell his last name and where he works?
 A. Just like it sounds. He's in the book I'm sure. He's a polygraph examinationer (sic) in Cincinnati, Ohio.

Q. Is it just Anderson, is that . . .
 A. Ummm-hmmm.
 MR. BLOUNT: Where were you then, when you said - you were there for a short time—did you go back to your office?
 A. Yeah, exactly. This was in the morning.
 MR. BLOUNT: Now that's the day that Billy New resigned; how did you know that Billy New resigned?
 A. I got a call from one of the attorneys [22] who was down there, and said all this shuffling and hustling was going around and said we (unclear) go out and do something real quick and left, and we heard he resigned.
 Q. Can you tell us who that attorney was?
 MR. BLOUNT: Was it Jim Cooney?
 A. Well, I think it might have been. Coondog, yeah.
 Q. Did you get upset at your office in Thompson's presence that New had resigned but Dolan had not? And also say that you would have to file charges? Was that when you made the decision to file charges?
 A. Is that when I decided to file charges. No, that would not be an accurate way of stating that. I was totally surprised at the manner and celerity of his resignation to say the least. In my humble opinion the whole thing was orchestrated, but that's not the question you asked me anyway. No, that is not when . . . when that fact happened and Dolan didn't resign which of course, I wouldn't have expected that; that's not when I made the decision to file a formal complaint, no.
 Q. And when did you decide to file a formal complaint?
 A. When I got the results of Carl Anderson's [23] lie detector test and made a couple of other collateral corroborations which I've told Mr. Blount about.
 MRS. LONG: Do we have a date on that?
 MR. BLOUNT: Are you talking about (unclear)?
 A. The 22nd.

MR. BLOUNT: The lie detector test was . . .

A. 22nd.

Q. The lie detector was taken the 22nd and you got results back . . .

A. I don't know. It's on the letter, and the Grand Jury has it. I left it with John Holcomb this morning, so I don't know what the date is on the letter.

Q. Like within a week afterwards?

A. Oh, I'm sure.

MR. BLOUNT: Was it on a Monday?

A. Yeah, it must have been.

MR. BLOUNT: (Unclear) trial for Tuesday morning.

A. But I think at the time after he did it, he gave his oral opinion and then reduced it to writing.

Q. Did Alice ever realize that you were going to file charges then? I mean, did you indicate that you were going to have to go beyond what so far had been basically [24] had been anonymous? (Inaudible)

A. I did not tell her that I was filing a formal complaint. I'd be pretty sure that I did not tell her that I was going to. I would certainly agree with that. Not that I recall.

MR. BLOUNT: What happened? Can you take us from the time you learned of the New resignation through the remainder of the day?

A. Yeah, we—as a matter of fact we all went out to lunch at Bob Evans, on Colerain Avenue. Thereafter, I think I went back to my office. Nothing of incident after that, but we did all go out to lunch.

MR. BLOUNT: "We" is . . .

A. Joe Cox, myself, my wife, Dave and the two girls.

Q. Any reason why you went there?

A. To Bob Evans? Not specifically to Bob Evans, but there was a reason I chose to go out of town.

Q. Which was?

A. Because I wanted to try to maintain their anonymity and I didn't want to go to Hydes and eat lunch.

MR. BLOUNT: Yeah, that's for sure.

A. So, yeah, there was a specific reason why [25] we went out of town.

Q. Were you trying to protect their anonymity at all in the beginning for that second meeting doing it at night—from 12:30 to 5:30?

A. Oh, sure. Sure. Yeah.

MR. BLOUNT: Did you do anything else in their behalf to try to make sure they did have the proper cover?

A. Yes.

MR. BLOUNT: What?

A. I tried to determine that their immunity would be certain.

MR. BLOUNT: And how was this done?

A. Through the prosecutor.

MR. BLOUNT: Did John (inaudible)?

A. Yes.

Q. And what was his response?

A. I was assured that they would be given it.

MR. BLOUNT: At that time was he aware of what you had? Is that the first time (inaudible). I don't know what the date would be, but . . .

MRS. LONG: That was September 22nd.

A. If I saw him that day—I might have saw [26] him Friday or Monday, before (inaudible). And for the obvious reasons he also preferred that I go through the normal channels of filing a complaint.

Q. Did he tell you that on the 22nd, or on another day?

A. Well, I'm not sure, but sometime between the 22nd and the 27th when I actually filed the charges. For the obvious reason, you know, if there's something there then it should go just as every other case goes—you have some officialdom attached to it which is the police department, and let them investigate. Don't let me say I'm jumping on Dan Connaughton's political bandwagon and we're going to go shooting off, and I understood that.

Q. Okay. Did . . . Thompson told us that she heard from you that she could not get immunity—did you tell her that she could not?

A. Absolutely not. I think who she did hear that from is Mr. Matthew Crehan, who happens to be, as we all know, in the lie of the other side. And I was specifically told that she had a conversation with him, who suggested to her, and made the suggestion to her sister as well, that they would be better off pleading the Fifth Amendment before the Butler County Grand Jury, because there wouldn't be immunity [27] forthcoming.

Q. Did you ever discuss the issue of immunity with them? With Thompson and her sister?

A. Sure. I reassured them on as many occasions as I thought it necessary, or that the issue was brought up, that John Holcomb has never told me anything that he couldn't do, even though the Judge gives immunity and all the cases he has ever requested immunity from the Judge, he's never been refused, and it's almost axiomatic in a criminal case that if you're up after a higher person

...
MR. BLOUNT: It's common practice?

A. Yeah, it's common knowledge. I understood fully that someone not having been involved of it had genuine fears about it. I tried to allay those fears in every opportunity that they rose to the surface, and told them that I worked for Holcomb and I knew about the process and if John told me that they were getting immunity they were getting immunity—plain and simple.

Q. One last statement. At lunch Thompson said that you promised to take her and her sister out to a post election victory dinner at the Maisonette?

A. I promised to take them to the Maisonette? Hell, I haven't been to the Maisonette for years.

[28] MR. BLOUNT: Was it discussed? Was it brought up?

A. It may have been. It may have been. I won't deny that some loose discussion in a kidding way was . . .

MR. BLOUNT: Did you compare Bob Evans with the Maisonette?

A. No, we didn't make those comparisons, but if she said that was discussed, I wouldn't say that she was not telling the truth. If she says that I made a firm statement that we were going to definitely plan a party at the Maisonette, that's not true. But now I'll say something real quick.

MR. BLOUNT: Okay.

A. It became clear to me, not so much on the 17th, even though she alluded to it and her sister did, that she has had some problems—I think she's been to Hughes and some different things like that, and she's given to some emotional outbursts. That wasn't discussed in great detail, but it was alluded to by (inaudible). But nothing evidenced itself that night to indicate it; she told a very calm story, exactly what happened to her in her particular case. It was supported to me when, probably four weeks ago I'm sitting at home on a Friday or Saturday night and the phone rings and [29] she is absolutely hysterical to the point that there is no reason and I was a traitor who betrayed her; she was supposed to remain anonymous; she wasn't; we were out to get her; we lied to her, and all sorts of charges of that nature. With the greatest degree of restraint I talked to her for about twenty minutes, and admitted to her that upon reflection, I thought that one thing I should have done is before I actually filed the formal complaint I should have called her to let her know that I was doing that, which I did not, and I admitted to her that probably that would have been the best thing for me to do. But in the heat of everything going on I neglected to do that, and she likewise may have proffered some of the charges that you are now confronting me with, in a little more graphic and colorful language.

Q. Gee, this is the first time I was called non-colorful.

A. But to give you an idea of the fever pitch she was at, I was so concerned about her and her representations

to me, among the other things, that she has suggested fear for her safety and that people are talking against her and saying why are you ratting, why are you turning against these people and all this, that I called Jeff Landreth at home and told him about the conversation I had just had. And [30] I said Jeff, I am not a person who cries wolf, but I said, I am genuinely concerned with this gal, about what she perceives to be problems around her, and I don't know what you can do, what you will do, but I just felt I had to call you. And I related to him some of the things she was telling me and some of the fears she was expressing. And he responded in a fashion of saying that because of his FBI experience this was a fairly natural response once a person has given some information that places them in the posture of being called a snitch and whatever else. And I said, well, I recognize and appreciate your experience in these things and I'll accept that, but I just want to tell you that she's really going wild and I'm concerned. And he said, well, you know, the only way that I can answer that any further is to tell you that if there's somebody there, there's some real and present danger, he said I'll go out myself and get the police out there, but he said, I can't act and won't act just upon her general statements of being fearful of her condition.

Q. Patty didn't call you similarly, with concerns about being a snitch—whatever?

A. Yes, but in calm, logical discussion that we would talk about it.

MR. BLOUNT: Had they actually been confronted by someone, or do you think it was the fear that they would be confronted?

A. I think some people had talked to them, and I don't know who, but I feel that, however it got out—and maybe it was just inter-family (inaudible) but they had been talked to, and people expressed their dissatisfaction about what they were doing.

MR. BLOUNT: (Inaudible)

A. No, not outside. Maybe Mr. Breedlove and his wife or something, who were not happy with the situation either, I guess.

Q. When did she call? Before or after New had been arrested?

A. Well, let's see. Well, I would assume that it was after he was arrested. Because. . .

MR. BLOUNT: That's when it became apparent that you probably (inaudible).

Q. She also said that she had called, or she had been brought down to the police station to give a statement, and that you called her then, you know, that evening, after that, and said I understand you've talked to the police, I wanted to know what you said?

A. No, I don't believe I called her; maybe [32] somebody did, but I don't believe I talked to her the day that she went to the police department. I'm fairly certain that I did not.

Q. Do you know who would have?

A. No.

(Comments not on the record.)

A. I kind of felt this was going to come about; I could understand her going in this direction. This is just an aside.

Q. Okay. Did you ever represent to her that you were trying to clean up the Courts?

A. When I heard what I heard I was appalled and said that's disgusting and I'm going to put an end to that in any way that I can. I'm sure that I said something like that.

MR. BLOUNT: He'd bring the same thing (inaudible).

A. Yeah, it's kind of like a broken record, or tape, as it were, but. . .

Q. I think that does it for my questions. I think. Let me check my notes.

MR. BLOUNT: Anything else about that old scenario of the chain of events that (inaudible).

[33] A. You mean with reference to Alice?

MR. BLOUNT: Yes. (Inaudible)

A. The first time that I ever laid eyes on Patty Stephens and Alice Thompson was in my (inaudible) on September 17th. Likewise, the first time that . . . that was the very first time that I had heard any of the information by them.

Q. Why were the Barneses there?

A. They're neighbors and good friends, and I just thought it was a good idea if someone who wasn't so-called in my camp, or a relative, was privvy to this information.

Q. So they were invited over then?

A. Yes. And I don't think either one of them uttered a word; they just sat there to observe.

Q. Did she ever—did Alice Thompson ever say to you that she felt that you had tricked her?

A. Yeah. Yeah. On the phone that night. She called me everything but a white man.

Q. Which night?

A. When she called in hysteria.

Q. Okay.

A. To express her fears.

[34] Q. What date did we establish that as?

A. I can't put a bead on it.

MR. BLOUNT: (Inaudible)

A. Yeah, I would assume that would have to be then, but I can't pinpoint it any further for you than that.

Q. Did you feel as if you had tricked her?

A. No. But I could understand to a degree how she had those feelings, even though the extent of how she was presenting it was obviously shaded and bizarre. In other words, Patty did not ever get into that sort of thing at all with me; she just wanted assurances that there was immunity, she was going to see it through; what happened happened and that's the way it was. And

so I, you know, we were reasonably sure (inaudible) that she had some other problems.

Q. And you said that she had been into Hughes?

A. I think that's correct.

Q. Did you have anybody to back that up?

A. No.

MR. BLOUNT: You didn't check it out? You took it at face value?

(No response.)

Q. So her sister Patty, again getting back and going over the promises—pardon me for going back to them [35] but that seems to be a hefty charge against you.

A. That's alright.

Q. Her sister Patty is not going to get a job in the Municipal Court if you're elected?

A. Not that I know of.

Q. And she's not going to be disappointed to find that out, right?

(No audible response.)

MRS. LONG: That's it for me. Thank you.

MR. BLOUNT: Thank you.

MR. CONNAUGHTON: You're welcome.

AND THEREUPON, the interview is terminated.

DEFENDANT'S EXHIBIT J

TRANSCRIPT OF THE INTERVIEW
OF
ALICE THOMPSON
CONDUCTED BY
JOURNAL NEWS

[1] PAM LONG: Today is October 27, 1983; it is 11:30 in the morning; we're meeting at Hank Masana's office, and present at the meeting are myself, Pam Long, a Journal News Reporter, Alice Thompson, Hank Masana, and also Jim Blount.

EXAMINATION—By Pam Long:

Q. For the record we'd like to state . . . have you state your name. Is it Mrs. Thompson?

(Inaudible comments in background.)

A. Okay.

Q. Okay, Miss Thompson, that's fine.

MR. MASANA: (Inaudible)

MRS. LONG: Sure, go on ahead.

MR. MASANA: First off, you had indicated that you would give Dan an opportunity to respond to that, if that prelude is on there.

MR. BLOUNT: No, no.

MRS. LONG: He's not going to hear the tape. No. That's ours.

MR. BLOUNT: He won't hear the tape, no.

MRS. LONG: No.

MR. BLOUNT: That's for the benefit of the [2] four people in the room.

MRS. LONG: Yeah.

(By Mrs. Long)

Q. Okay. I'd like you to state your name and spell it? Your full name. And also give me your age, and your address?

A. Alice Thompson, A-L-I-C-E T-H-O-M-P-S-O-N.

Q. And your age?

A. Twenty-two.

Q. Okay. And your address?

A. 1757 Shuler Avenue. Excuse me, that's my mother's address—1740.

Q. 1740, okay. Now we established prior to turning on the tape that Mr. Masana is not representing you, but we would like at least to have the background as to

how the two of you got together. So if you would tell us what...

MR. MASANA: Off the record.

A. I contacted him.

Q. Okay. Can you tell us when?

A. I don't know.

Q. This week? Last week?

A. (Inaudible.)

MR. MASANA: Could I interrupt?

[3] MRS. LONG: Sure.

MR. MASANA: It was two Mondays ago, because you remember last week I was on vacation, so it was two Monday's ago.

A. Oh, that's right, yeah.

Q. And what did you go to Mr. Masana?

A. Why? I heard that he was Billy's lawyer and I wanted to let him know that I didn't start all of this, the way it looks. Connaughtons approached me; I wanted somebody to hear my story about the way Connaughtons tricked me. (Inaudible).

Q. What I'd like then is for you to start with the incident prior to your arrest at K-Mart and explain what happened there, and then just work all the way through—just explain, you know, the difference steps if you can.

A. I'd rather not. That's part of the case, isn't it?

MR. MASANA: Well, I don't know what she wants to say. You were arrested for...

A. Yes, I was arrested for petty theft.

MRS. LONG: I just wanted to establish the times and all, and that sore of thing.

Q. So you were arrested for petty theft then?

[4] A. February '82.

Q. Okay. At K-Mart, Dixie Highway?

A. Yes.

Q. It's already part of this subpoena, and it's already part of the public record. Okay, so when did your case come to trial?

A. February '82.

Q. Okay.

A. I can't remember the exact date.

Q. That's fine. And what happened? Did you go to Court? Can you establish then what happened in Court.

A. (Inaudible).

Q. Okay, you went to Municipal Court on your Court day, right.

A. Ummm-hmmm.

Q. Okay, what happened then?

A. This is off the record? Only this is the part of the case I was instructed by my lawyer not to...

MR. MASANA: I think that may be part of the case. I think maybe suffice it to say the case were disposed of there, and...

MS. LONG: Ummm-hmmm.

Q. By disposition was it disposed on record, [5] on in the Judge's chambers?

A. No, I only talked to him.

Q. Before Judge Dolan?

(No audible response.)

A. And Mr. New was present?

Q. The day we went to Court? Is that what you're talking about?

MR. MASANA: Were you represented by counsel?

A. (Inaudible).

Q. Had you been to Municipal Court before?

A. Yes.

Q. Okay. Had you been represented then?

A. (Inaudible).

Q. But this time you weren't?

A. No.

Q. Why did you choose to do it that way?

A. I was just, you know... I just didn't get a lawyer.

Q. What month of the year were you in Court before?

A. Well, I couldn't tell you, it was a few years before that.

[6] Q. Maybe in '80?

A. Probably '80.

Q. Summer? Spring? Fall?

A. Summer.

Q. What was the charge—

A. Assault.

Q. Was that handled in open Court?

A. Umm-hmmm.

Q. By Judge Dolan?

A. (Inaudible).

Q. Okay. What was the . . . when you said your case was disposed of in open Court, what was your fine? Or did you have a fine? Were you found guilty?

A. (Inaudible).

MR. MASANA: Are you talking about the assault?

MRS. LONG: No, the other one. The second charge, the petty theft charge.

A. I can't remember to be exactly, what the fine was. I didn't keep . . . I threw my receipt away.

Q. Ummm-hmmm.

A. To tell you the truth, I can't remember (inaudible).

[7] Q. Okay. Okay.

A. I can't remember (inaudible).

Q. Okay. So you had . . .

A. I had a fine.

Q. But you did have a fine?

A. Yeah.

Q. You did have a fine. And you were found guilty then, right?

A. (Inaudible.)

Q. Was there jail time involved?

A. (Inaudible).

Q. Was it suspended?

(No audible response.)

MR. MASANA: Let me help her. Usually, in that particular Court, if it's a first offense, Judge Dolan will

say like a hundred and costs and thirty days in jail. Once the fine is paid and cost is paid, in most of those cases the jail term is suspended.

MRS. LONG: Suspended.

MR. MASANA: The jail term is put there as a sort of (inaudible) to make sure that they pay the fine.

[8] MS. LONG: Okay.

MR. MASANA: I suspect that's what happened in her case.

A. (Inaudible).

Q. Now, that's the only time that you've been in Hamilton Municipal Court.

A. Yeah—the first . . . the first charge, you know (inaudible).

Q. Okay.

MR. BLOUNT: Was that because you couldn't pay?

A. No. (Inaudible).

Q. I take it there's a distinction then?

MR. MASANA: Yeah, yeah. This is a sort of a combat between two people.

MRS. LONG: Now I'll get into that.

MR. MASANA: You're more apt to get jail time out of something like—out of violence than you are out of . . .

MRS. LONG: Okay. Out of something like a crime against a corporation or something like this.

Q. We haven't established yet, but did you [9] come to this meeting today on your own?

A. Yes.

Q. Okay. You were not asked to set up a meeting were you?

A. No, when I contacted my lawyer—I wanted to talk to Hank Masana—I told him what I wanted to talk to him about, to let them know—I want people to know the story here; how it come about, because right now people think that I went voluntarily, you know, started all this, and I didn't. I was approached.

Q. Who's your lawyer?

A. Matt Crehan.

Q. Does he know that you're meeting with us today?

A. Yeah. I guess. I'm not for sure.

Q. Who contacted the Journal News then? That part hasn't been explained to me.

MR. BLOUNT: (Inaudible).

MRS. LONG: Why was the Journal News chosen to hear her story?

MR. MASANA: Frankly, because she wanted the Journal News to hear, that was her approach to me. [10] A. I've been wanting you to hear the story, you know. In the beginning, I didn't know how to go about doing it, you know. I tried to tell the Cincinnati Enquirer, they've been calling my home too, but they won't print what I told them—they haven't printed what I told them; they only print what they want.

MR. BLOUNT: Did you talk to Carolyn (unclear)?

(No audible response.)

Q. Then let's get into—now that we've established that there was an appearance in Court, and that there was a fine, what happened then subsequent to your appearance in Court? As far as contact by the Connaughton people?

A. I never . . . I didn't meet the Connaughtons until about two weeks ago.

Q. Okay. Did somebody contact you, or did you contact them? How did this happen? Tell me your story?

A. I walked in my mother's living room, and there they sat with my sister.

Q. Who is your sister?

A. Patsy Stephens.

MR. BLOUNT: (Inaudible). August?

A. (Inaudible). I think it was August.

[11] MR. BLOUNT: Who was in the living room, your mother and your sister?

A. My mother and my sister.

(By Mrs. Long)

Q. Your mother's name?

A. Zella Breedlove.

Q. Spell it.

A. Z-E-L-L-A B-R-E-E-D-L-O-V-E.

Q. Okay.

A. Dave Berry, which is Dan Connaughton's brother-in-law.

Q. Okay.

A. Martha Connaughton.

Q. And she is?

A. Dan's wife.

Q. Okay.

A. Joe Cox.

Q. Who's Joe Cox?

A. Dan Connaughton says he's the head of his campaign.

MR. BLOUNT: (Inaudible).

A. Dan told me too. He's supposed to get the bailiff's job (inaudible).

[12] MR. BLOUNT: Bailiff designate, or something like that.

Q. Did you know about that meeting that you said happened in August, before September 1st, or around there?

A. The day I met them?

Q. Yeah, did they tell you . . .

A. Did I know they was supposed to be there?

Q. Yeah, did they tell you they were going to be here?

A. No.

Q. Was it intended for you to be there, or did you just happen in?

A. I walked in, but when I walked in my mother said, you know, this is my daughter Alice, and they said, oh, Alice Thompson, we'd like to talk to you.

Q. Why were they talking to the Connaughton people?

A. They come there to the house, you know. They had got Pat—my sister's name from June Taylor or John Ester of Channel 9.

Q. Who's John Estridge?

A. Channel 9.

[13] MR. BLOUNT: John Ester.

A. Ester. (Inaudible).

MR. BLOUNT: Why did they have your (inaudible).

A. (Inaudible) my sister.

MR. BLOUNT: (Inaudible).

A. I don't know.

MR. BLOUNT: Had your sister ever been involved in a DUI case?

A. That would be . . .

MR. MASANA: You said DUI.

MR. BLOUNT: Yeah.

MR. MASANA: She's been arrested before, hasn't she?

A. No. At Fairfield before.

MR. BLOUNT: For DUI?

Q. No.

MR. BLOUNT: I mean, nothing that MADD would be involved in?

A. No. Well, her son got hit when he was five years old. This wasn't (inaudible).

Q. This was Patsy's son that got hit?

A. Yeah. Only that's the reason why she was . . .

Q. So did she know June before?

[14] A. I have no idea.

MR. BLOUNT: Was the son killed?

A. No.

Q. So she was talking . . . they were at your mother's house talking to your sister—and just that they had had the names from June Taylor or John Ester of Channel 9 News—what were they there to be talking about?

A. Martha said she wanted to help in her husband's . . . we want to help . . . Martha Connaughton wanted to help in her husband's election.

Q. Did she say that to you?

A. Ummm-hmmm. I don't know what she had told Patsy and my mother . . .

Q. Uh-huh.

A. Before I got (inaudible) but she told me. (Inaudible) no I don't. I said how can I help, you know, I don't know nothing about elections.

MR. BLOUNT: Were you mad at the Judge, or did you say something to somebody, that somebody would have heard about it.

A. No. They said they knew the whole story about me (inaudible).

MR. BLOUNT: How?

[15] A. I don't know how.

MR. BLOUNT: They knew about your . . .

A. They knew all about me. They knew everything there was to know about me. Both times I've been in Court.

MR. BLOUNT: Did they say how they found out about you?

(No audible response.)

(By Mrs. Long)

Q. Did they indicate they had checked the Court records?

(No audible response.)

MR. BLOUNT: Did you ask them why they had singled you out?

A. It's involved with my sister. I don't know if she told them my name, or if they knew it before—they never did say. (inaudible) The next time we met they come to my mother's house and picked me up—I was supposed to be out there at 12:30 at night.

Q. Okay. This first meeting . . .

A. Yeah, they was wanting to know . . . well, if I go into it, it's telling about the case, you know.

Q. Okay.

[16] A. But it was wanting to know . . .

MR. BLOUNT: Let me ask this question.

At this first meeting you agreed to help them?

Or you agreed to meet with them? Or what did you agree to do?

A. No, they was just asking me questions about the court.

MR. BLOUNT: You didn't agree to anything, you just answered the questions?

A. Yeah, you know. They was doing all the talking. You know. They knew everything. They was telling me everything.

MR. BLOUNT: Then you were answering only yes and no?

A. Yeah. You know. They's say is this correct. You know. My sister Patsy told me it was alright, to go ahead and talk. You know. So I'd answer yes or no.

(By Mrs. Long)

Q. Is Patsy older than you?

(No audible response)

Q. How old?

A. She's thirty-two.

Q. Okay. So you went ahead and . . . what [17] were some of the . . . what were the major points covered in this conversation with them?

A. They wanted . . . Judge Dolan—I've never seen the man except for up on the bench; I've never talked to him.

Q. Why did they want to know about him?

A. I guess (inaudible).

Q. I mean, did they give you any other indication that there might be some problem with Judge Dolan, or something like that?

(No audible response.)

Q. What were some of the other points?

A. They asked me if I (inaudible).

Q. Did they ask you specifics about your . . . if you had any conversations with Billy New, and about that case? Did they get into specifics on that?

(No audible response)

Q. What happened then after that? What were some of the other things that they talked about?

A. That's all they was concerned about.

Q. Did they establish a second meeting?

A. Yeah, well I—no, I never seen them again until a few nights later they come to my mother's house at [18] 12:30 at night, Joe Cox and Dave Berry.

MR. BLOUNT: (Inaudible) at 12:30? Do you work or something that you'd only be available at that time?

A. No, they had changed cars and everything. They said they wanted to take us over to Dan Connaughton's house so nobody would know (inaudible).

MR. BLOUNT: Where does he live?

A. Fairway Hills.

Q. Okay. Who was involved there at that 12:30 meeting?

A. That come and picked us up?

Q. Yeah? And who was at your house and all the rest of it?

A. My mother was sitting in the yard.

Q. Was this a weekend night?

A. No.

Q. So it was a week day?

MR. BLOUNT: This would have been in August also? Or early September?

A. No, I think this was the first part of September.

Q. Do you know if it would have been before [19] or after Labor Day?

(No audible response.)

Q. So your mother was sitting in the yard; who else was there?

A. Ah . . .

Q. This was at your mother's house, I take it?

A. Ummm-hmmm.

Q. Okay.

A. My mother was there, Patsy, and (inaudible).

Q. Okay.

A. No one that was up, you know, that would know what was going on except my mother and me and Patsy.

Q. I take it that there were children in the house, or something, that were asleep?

A. Yeah.

Q. Okay. Who drove up then? Who was in the car?

A. Dave Berry and Joe Cox.

Q. Only those two?

A. Ummm-hmmm.

Q. Okay. And what did they tell you?

A. They said they wanted us to come with them to Dan Connaughton's house to talk, and nobody would bother [20] us; nobody would know we was over there.

Q. You hadn't met Dan Connaughton the first time then, had you?

A. No. They just took us (inaudible).

Q. Okay. And this was in the first part of September—I mean, it wasn't like after Labor Day, or the middle of September, right?

A. Yes. I can't swear on it, you know.

Q. Okay. And they wanted you to talk then. Okay. What happened then?

A. We went to their house—went over to Dan Connaughton's house, and Dan Connaughton, Martha Connaughton, and two of their neighbors across the street was over there.

Q. Do you know their names?

A. I think their last name is Burns, but I'm not for sure.

Q. Okay. So this would be across the street from Dan, right?

A. Yeah.

Q. Okay.

MR. BLOUNT: Is it Burns, or Barnes?

A. Barnes—Burns or Barnes?

Q. Do you know what he does?

[21] A. He's a fire . . . fire chief or something; his picture was in the paper.

MR. BLOUNT: Ernie Barnes and Jeanette Barnes?

A. I think that's it. His picture was in the paper; his name was in the paper not too long after that.

Q. Okay. Did they indicate that they lived across the street? Or did you see them come across?

A. Yeah. Dan introduced us and told us they lived (inaudible).

Q. Now did he explain why they were invited to this meeting?

A. He wanted another witness there because they had three tape recorders going.

(Comments off the record.)

Q. Okay. So he was counting . . . was he counting Berry then, and Cox as his witness, or . . .

A. (Inaudible) Dave Berry and Joe Cox (inaudible)

Q. Okay. Then what happened?

A. They introduced theirself as (inaudible) of Dan Connaughton. They introduced me to the neighbors, and they started talking to Patsy first. They asked Patsy a lot of questions.

[22] MR. BLOUNT: Were they about her or about you? The questions they asked?

A. About her.

(By Mrs. Long)

Q. Did you get an idea then as to why they knew her, or why they were always bringing her along?

A. Well, I'll get to that.

Q. Okay. Keep talking.

A. They started asking me a bunch of questions so I asked Dan Connaughton—I said, let me ask you this. I said why are we here? I said why are you doing this, you know? I said, what's the whole deal? And of course, he turned off the tape recorder. And he said, I'll tell you

the truth. He said, all I want is to get enough evidence on Billy, he said, and have Billy to resign. And he said, of course, if Billy resigns, Dolan will resign, and he said, then I can just step up on the bench. And I know Dolan (sic) wanted me to say things I guess, about Dolan, but like I said, I don't know the man. But he said right out of his own mouth, all I want to do is to get a story in evidence on them, to meet them face to face, and show them what evidence he had against him, or whatever, to get them to resign, and no more would be said about it. [23] MR. BLOUNT: Did he indicate how he would go about that?

A. He said he would just like to meet them face to face and play tapes, you know, and show them . . .

MR. BLOUNT: What tapes did he mean?

A. . . . evidence, and just scare them into resigning.

(By Mrs. Long)

Q. Do you know much about how people are elected, and how they assume office?

A. No.

Q. Okay. So in other words, based on what he said to you, you believed him?

A. Blackmail. I mean, you know, the way he phrased it, the way he said it, you know. He said all he wanted to do was get enough evidence on Billy, and he also used Dolan's name, which I don't know what he was going to get on Dolan—to scare them into resigning. I said what happens when they resign? Nothing more will be said about anything. He said when I take the bench nothing will be said. And I told him then he was crazy.

MR. BLOUNT: Was this tougher than going to Court?

[24] A. What?

MR. BLOUNT: Was being questioned by the Connaughtons tougher than going to Court?

A. Ummm-hmmm. They turned that tape recorder on and off so many times, you know, left out what they wanted to.

MR. BLOUNT: They had it on when you were talking and off when they were talking?

A. I don't think Dan Connaughton's voice is on it.

MR. BLOUNT: Did they play it back for you?

A. No.

MR. BLOUNT: Did they offer to give you a copy?

A. No.

(By Mrs. Long)

Q. But you did tell them what had happened then between . . . when you were in Court?

A. Well, first I asked them what I was going to get out of it.

Q. What did they promise you? Or what did they say when you asked them?

A. They said my help would be deeply appreciated. [25] And they went on to talk about the three weeks vacation they was planning on taking when the election was . . .

Q. He was planning to take three weeks vacation?

A. Yes, the family—Dave Berry and Martha, and Dan.

MR. BLOUNT: They wanted you to go along?

A. Me and my sister would be welcome to go along with Dave . . .

(By Mrs. Long)

Q. Did they say they would pay your expenses?

A. Yeah. I made it clear to them that I couldn't afford a trip to Florida.

MR. BLOUNT: Was the tape recorder on at that time?

A. Oh, no.

(By Mrs. Long)

Q. Now where were they going to go?

A. Three weeks in Florida.

Q. And they added Disneyworld?

A. (Inaudible) a three weeks trip to Florida. And they had a friend in Florida that wouldn't be home at the time, that we could stay at their condominium.

Q. That was a pretty generous offer. Why [26] Why would he say—make such a generous offer to you?

A. I don't know. And they would try to find me a right job, because I'm out of a job, you know, and I'm having a little financial problem. They want to help me out as much as possible.

MR. BLOUNT: What kind of work do you do?

A. Waitress (inaudible) They was to find me a suitable job.

(By Mrs. Long)

Q. How long have you been out of work?

A. (Inaudible).

Q. When you asked them the first time, what was I going to get out of it, did they say anything more than just that your help would be greatly appreciated?

A. Yeah, that's when I went into the story about the ...

Q. The vacation? So you only had to ask once, what am I getting out of it? What had you expected to get out of it?

A. It blowed my mind when they told me all this, you know.

Q. Had you expected anything?

A. I didn't really mean the question, you [27] know, to actually get something, you know—I just meant it like you know, what am I going to get—kicks, you know. Why should I do this. Really, I didn't expect—you know, to hear them say something like that.

MR. MASANA: There's more. Tell them about it.

A. Okay. All about the restaurant and everything—that was another day—we didn't get into that (inaudible).

Q. So you did cooperate with them at this point, and for the second time in front of Berry and Cox, you repeated your story, right?

(No audible answer.)

Q. Okay.

MR. BLOUNT: Did you tell them anything after they made their promises that you wouldn't have told them if they hadn't made promises?

A. They already knew.

MR. BLOUNT: Everything. In other words, they ...

A. They knew everything when they approached me. You know, I didn't tell them nothing else but they already knew.

[28] MR. BLOUNT: So all they wanted you to do was put it in your own words on the tape?

A. On the tape.

(By Mrs. Long)

Q. The promise was made after you gave them the statement? Or before?

A. The tapes was going on. They started asking me a bunch of questions, and I asked them, you know, what was going on? And he told me, you know, (inaudible) my help; he said my services would be greatly appreciated.

MR. BLOUNT: Was it Dan Connaughton himself who talked about the trip?

A. Yeah. He did most of the talking in the living room. Like I said though the tape recorded was off when Dan spoke.

Q. Did he also promise you to find a job?

A. Yeah.

Q. Why did he offer to find you a job?

A. Because the day at the house, going back to the first time I met them, Martha was asking me did I work, or anything, and I was telling her I was looking for work. I had been out of a job. Evidently she must have talked to her husband about it, and that night over at his home, he [29] said are you employed now, you know,

did you find a job, and I said no. So he said, we'll see if we can't do something about that. I told him I wanted away from bartending and stuff; he said we'll see if we can't do something about it. You know, a decent job.

Q. Did you feel at that point that you could depend solely on him to get you a job? I mean, if you just waited it out until the election then he would suddenly right after the election say, oh, by the way Alice, here's a job in my office, or something like that?

A. (Inaudible) And another thing, he specifically said the names—me and my sisters names would be unidentified; nobody would know who we was. And that nobody would hear the tapes except the ones. . . He made that promise.

MR. BLOUNT: Did he say anything about playing the tapes for Judge Dolan?

A. Oh, yes, I guess he was talking about the tapes, because he said he wanted to meet them face to face and show them the evidence. But as far as anybody else, the public, or anything like that—or it going to Court, we wouldn't have to worry about it; we wouldn't have to go to Court and our names wouldn't be on there.

[30] MR. BLOUNT: Your name wasn't on the tape; your full name wasn't on the tape?

A. No.

MR. BLOUNT: Was the name Alice on the tape?

A. Alice. But you know, like I said, as far as going to Court—it wouldn't go to Court—because I told them at the beginning that I didn't want to be involved in no Court thing. They said it would not go to Court, and our names would not be identified.

(By Mrs. Long)

Q. Is there anything more about that second meeting that we should know about?

MR. MASANA: Off the record—you were saying something about Dan was encouraging you to say things in a certain way?

A. Oh, yeah. He was leading me in questions, you know.

(By Mrs. Long)

Q. Can you give us an example?

A. Well, he kept on trying to get me to say that Dolan had something to do with this, you know.

Q. Would he phrase it in a question? Like, [31] did Judge Dolan have anything to do with it?

MR. BLOUNT: Wasn't it true that Judge Dolan did this, or something?

A. Yeah, you know, and so on. But like I say, if you listen to the tapes you're not going to hear it, because his voice ain't on the tape. If it is, it's just a few words that he's saying. Maybe his lectures, you know.

(By Mrs. Long)

Q. All three tape recorders. . .

A. When he was giving his good samaritan lecture.

Q. What was the good samaritan lecture?

A. Oh, you know, what a deed; I'm just trying to clean up the Courts, and everything. But yet he's doing it—I mean—you know. . .

MR. BLOUNT: (Inaudible).

A. If Dolan would resign—which Dolan ain't got no reason to resign, along with Billy, nothing would have been said about this. This wouldn't have went to Court.

(By Mrs. Long)

Q. But at that time—you sound like now you're convinced that Dolan had no reason to resign—but at the time when he was making the promise that you wouldn't know—[32] or that nobody else would know about your involvement, you're saying that. . .

A. I didn't never say nothing about Dolan, because like I said, I've never talked to the man; I've never seen him except for inside the courtroom?

Q. Okay. Did he have you—did he lead you, as you say, on the new aspect of the case? I mean, did he ask you various questions around New, to agree that. . .

A. Yeah, he said really say the answer, you know, and say is this the way this happened, you know. But like I say, I can't go into that, because that. . .

Q. Sure. So it was a yes, no, situation for you in that he'd phrase it a certain way and all you had to do was yes or no?

A. Ummm-hmmm. And then, you know, he'd say to repeat that.

MR. BLOUNT: You say you were picked up about 12:30, and I assume you were probably there about 1:00 o'clock?

A. No, we was over there at 5:00; we was over there at 5:30 in the morning.

MR. BLOUNT: 5:30 in the morning? That's what I was going to ask you.

[33] A. Because Martha Connaughton asked me to spend the night. Because I was complaining that I was tired and sleepy and wanted to go home and take a bath. She offered me a gown to sleep in and told to take a shower?

(By Mrs. Long)

Q. Did you?

A. No.

Q. Did you think it was rather strange that somebody in the middle of the night would come over to your house and say . . . did you ever ask them why they couldn't carry this business on in the daytime hours?

A. No, because what you want to do, you want to sneak and get enough evidence on Billy, and like I said, I don't know what he's (inaudible), and Dolan to get them to resign.

Q. Okay. But so the reason why it was at dark was so that nobody would see you go into the house?

A. Yes.

Q. Isn't dark a little bit earlier than 12:30?

A. (Inaudible.)

MR. BLOUNT: So that was the second meeting? You indicated earlier there was another meeting?

A. Ummm-hmmm.

[34] (By Mrs. Long)

Q. Did you—did you have phone numbers or anything like that? Did he say contact me if you think of anything else, or encourage you. . .

A. He did say that, but I didn't get the phone number; I don't know if my sister did or not.

Q. But you didn't contact him between meetings?

A. The number is in the book.

Q. Okay.

A. No, I never did contact him.

Q. Okay. The third meeting—then?

A. I don't know how long—how far (inaudible)

Q. The first and second? Or the second and third?

A. The second and third.

Q. Okay.

A. I picked up the phone one night and it was Dave Berry.

Q. About what time?

A. 8:00 or 9:00 o'clock. And he said, Alice, he said I need to come and pick you and Patsy up in a little while, and I said why. He said, I just want to talk to you. So he said to have Patsy to call him back, so Patsy called [35] him back and talked to him—I don't know what was said, but they come about 8:00 o'clock the next morning to pick us up.

Q. Okay. You don't know how long there was between it—are we talking early September, middle of September maybe?

A. It was probably about a week.

Q. A week later?

A. Or a week-and-a-half.

Q. Okay. So one meeting was like—the second meeting was like at the beginning of September and then further into September, about mid September, there was another meeting?

A. Yes.

Q. Is that—I don't want to put words in your mouth, I don't need to do that.

A. Yeah, I guess. Well, I'll tell you, the day. . .

Q. Had Billy resigned yet?

A. I'll tell you how I remember the day—the date the meeting was. It was the day that Billy resigned from Court. September . . . 27th?

MR. BLOUNT: (Inaudible)

A. September 27th.

[36] Q. Okay. So it was the morning that Billy resigned?

A. Earlier that morning, yeah, they called.

Q. Okay.

A. But I'm not saying those two are linked together.

MR. BLOUNT: You didn't know that he had resigned?

A. No.

Q. So you went to the meeting with Berry, then found out at night. . .

A. Dave Berry and Joe Cox and Martha Connaughton.

MR. BLOUNT: Did they tell you about Billy?

A. He hadn't even resigned yet.

Q. So the notice wasn't in the paper; you picked up the paper after you got back from this third meeting? I assume you picked up the paper.

MR. MASANA: She can tell it now.

A. They had us all day. They said they was the only one that could talk to us about that.

Q. Okay.

A. They come and picked us up that morning and they took us over to Dave Berry's wife's office; she's [37] an interior decorator.

Q. Where is that office located?

A. Hamilton Cleves.

Q. Okay.

A. They took Patsy in the one room and was giving her a polygraph test. They wanted me to take it but I wouldn't.

Q. Did you see the equipment?

A. No.

MR. BLOUNT: She told you about it?

A. Yes.

(By Mrs. Long)

Q. Had she ever taken one?

A. On the way over there, you know, they was telling us what they wanted, you know. Patsy (inaudible)

Q. So Patsy went in and took the polygraph test?

A. Yeah, they had her in there a couple of hours, and Dave Berry, Joe Cox and Martha Connaughton sat out in the other room and talked to me. So after they did that we went to (inaudible).

Q. Did they explain why they thought you had to take a polygraph test?

[38] A. I imagine they was doing it (inaudible).

Q. I mean, did they establish why it was necessary?

A. They wanted me to take the polygraph test you know, so they could—I guess be sure, you know, if what they asked me was true. (Inaudible)

MR. BLOUNT: Wasn't Cooney there too?

A. Conney come in.

Q. Cooney?

A. Ummm-hmmm. He walked in and Dave Berry introduced me to him. After we left there, they had us there for hours.

MR. BLOUNT: It was late in the morning? Lunch time?

A. It was lunch time.

Q. You left at lunch time?

A. Yeah, everybody gone, they was hungry. So then we went to Dan Connaughton's office.

Q. When you refused to take a polygraph, did they try to put pressure on you to take the polygraph?

A. They kept on asking me, Alice, why don't you; why don't you. I just told them I didn't want into anything like that.

[39] MR. BLOUNT: Did they offer you anything to do this?

A. They had already offered me the trip and everything, but I didn't . . . well, what got me to thinking, you know, because here they want a polygraph test and everything; they had already promised that our names wouldn't be mentioned that nobody would know about us, and here they've got some man coming in and giving polygraph tests that knows all about it. Cooney comes in, and I asked Dave Berry, I said, what's he doing here, you know, because he introduced me. I said, you said nobody knew about this. He says, Oh, Cooney had already heard the tapes. I said, how many people has heard the tapes? He said about ten.

Q. Did he say who?

A. No. I asked him who, and he wouldn't say. He said about ten people. . .

MR. BLOUNT: How did you feel at that time?

A. I was so mad. (Inaudible) is what I did. He said they was people he could trust. I said fine, our names ain't supposed to be used, and I said here half the town already knows. Right then, you know, they had already tricked us, you know. Here everybody already knew. . .

Q. Who told you that they were people you [40] could trust?

A. Dave Berry, when he introduced me to Cooney, when I (inaudible). He said Cooney knew all about it.

Q. Okay.

A. We left there and went to Dan Connaughton's office.

Q. Did they get you lunch?

A. No, not until after we left Connaughton's office; Connaughton took us out to lunch.

MR. BLOUNT: Who was in his office? The same three?

A. We walked in his office and Cooney had beat us back over there; Cooney was sitting in Dan's office.

Q. Did they indicate that their case would be lessened if you didn't take the polygraph? That it would be weakened?

A. Ah. . .

Q. You say you were in Connaughton's office? Who all was there?

A. Well, me, Patsy, Joe Cox, Martha Connaughton; Dave Berry drove over there, and Cooney was in the office with Dan.

Q. Martha didn't go?

[41] A. Yeah, Martha was there.

Q. Martha was there. Okay.

A. Cooney was in the office with Dan. And he had just got . . . Dan said he had just got there to give them the news that Billy had resigned, and that Dolan had just walked over to the Journal News to (inaudible) that Billy had resigned. That's what they was talking about when we got . . .

(Comments off the record.)

A. That's what they was talking about when we went into the office. Because they was . . .

Q. Dan and Cooney were talking about that?

A. Yeah, and then they told us, you know, what they was talking about; that's their conversation, that's what they was talking about.

Q. How did they find out about that?

A. Cooney, I guess. Cooney said he was there, and you know, he gave it to him.

Q. This was before the paper came out?

A. Ummm-hmmm.

Q. Cooney knew of that then?

MR. BLOUNT: He was in the Municipal Court or in the Journal office.

[42] A. I don't know.

Q. He didn't establish how he came by that information?

A. No.

MR. BLOUNT: Because I think the Judge came about (inaudible).

A. He knew all about it, yeah.

Q. Okay. Then what was your conversation afterwards?

A. That's when Connaughton got upset because Dolan didn't resign. And I asked him then again, why should he (inaudible) resign, you know. I said, you're crazy if you think the man's going to give up the bench just like that for you. And that's when he said I want to press charges. My sister (inaudible) because he said he was going to file charges, and I said, file charges against who, and he said Dolan. I said, wait a minute; I said, you told us that our names wouldn't be identified; that we wouldn't have to go Court, and I said, you know—I didn't want to go to Court, I didn't want involved in any more of this. He said, I'm sorry, but he said, I have to do something. Then he got on the phone and called John Holcomb; he said I'll get you immunity. He got on the phone and he was talking to Holcomb [43] then he hung up, and he said okay, I'll get you immunity; he says you'll just have to lie low, and I told him (inaudible) I won't go to Court. And I said, I won't testify.

MR. BLOUNT: By lie low, were you going to hide somewhere?

A. Yeah, I'm going to get into that. They was wanting me and my sister to stay over at their house until this was all over. I said lie low, but our names would probably come out now. I was so afraid, you know, because I didn't want my name mentioned. He said not to worry that they would protect us and that we could stay

at their home until all this—until the election was over with. They wanted us to stay at their home.

MR. BLOUNT: Who would protect you?

A. I don't know.

(By Mrs. Long)

Q. Okay. You were talking about that they wanted to protect you and that they wanted you to stay—okay?

A. They said we could stay at their home; Dave Connaughton (sic) said we was welcome to stay at his home until after the election was over.

Q. Did he indicate why?

A. So people—so we wouldn't be at harm, was [44] way he put it, you know, so our names wouldn't come out. And I wanted it, you know.

Q. Did you think it was physical harm, or did you think it was more like emotional type stuff?

A. Yeah.

Q. Distress?

A. Yeah, I guess. Just like people's thinking right now, you know, that I'm a rat and I'm a snitch, but I'm not. It sounds like it. You know, I didn't approach—what I'm trying to say, I didn't approach the people; I didn't say here, I want to tell this; I know this, those people come to me.

MR. BLOUNT: Okay, what happened? What did he say when you apparently refused to go to his house with him? (inaudible) to lunch?

A. Well then (inaudible) to lunch and they took us out to lunch at Bob Evans.

MR. BLOUNT: You mean the one on Route 4, in Fairfield?

A. No, it's on . . .

MR. BLOUNT: Northgate?

A. The way we went . . .

MR. BLOUNT: Near (inaudible)

[45] A. No, because when we come back—when we come back we was out on Hamilton Cleves highway.

MR. BLOUNT: Out on Colerain?

A. Alright.

MR. BLOUNT: Colerain (inaudible).

A. The reason why we went there because he didn't want people to see us.

(By Mrs. Long)

Q. Did he say that?

A. Ummm-hmmm.

Q. How did you feel about that?

A. I felt low.

Q. Did you object?

A. No, I was starved to death. (Inaudible)

Q. Okay.

A. So we got in the restaurant and Dan was talking about his victory party; he was so sure he was going to win the campaign (inaudible) we're going to win the campaign, you know, that was his words. And he said he wanted me and Pat to definitely be there, and for a victory dinner he wanted to take me and Patsy to dinner at the Maisonette.

Q. This would be after he wins the election?

[46] A. Ummm-hmmm.

Q. But he called the lunch over at Bob Evans also a victory dinner, or victory lunch, or victory celebration?

A. (Inaudible) he said that he wanted to take us out for a victory dinner when he won the election. And then he was talking about restaurants and we got on the subject—well, we was on the subject of restaurants and he asked me what my mother and father was doing. They had heard through Patsy—I guess Patsy had said something about it in earlier conversations that my mother was a good cook, that she used to run a restaurant, and Dan started talking about, he's got a lease coming up on Council Chambers; he's got it leased out, him and his brother, I think.

MR. BLOUNT: On Court Street?

A. Yeah, owns the building. And the lease is almost up on it. I think it comes up—the lease is up in September. And he said he was thinking about putting a restaurant in there, and he was wanting to know if my mother and father would run it for him. And I said oh yeah, my mother would love to get back into the restaurant business. He said good, when the lease is up, he said, we'll tear the inside out and put a restaurant in there, and he said, your [47] mother and father can run it, and he said that way, he said you girls can help run it too, and put your sisters in there working too; he said just . . . he even made up a name—Breedlove's Lunch or something like that. Ma Breedlove's Cooking, you know. He had the names figured out and everything. He offered to buy us a restaurant, you know, and put us in that building.

Q. Okay. So it would just be your parents being a manager, they wouldn't have to buy—did you understand him that they wouldn't have to . . .

A. Oh, they was going to do everything, you know. They was just going to put us in there to work, or to run it. They wanted my mother to run the business for them.

Q. Did they ever mention then afterwards, since we're talking about a restaurant which was kind of one of his promises for getting you a job—did they ever mention again the three week vacation in Florida?

A. Oh, they was always talking about that, and what a good time we was going to have in Florida, you know, we can't wait until the election is over with until we get away in Florida.

Q. But they always included you and said, [48] you know, we're all going to do this?

A. Oh yea, because you know, they said, you've been in Florida before haven't you Alice? I said yeah. And then they'd ask Patsy and Patsy said no, and they said, ah, you wait until you get there. You ain't going to believe this and you ain't going to believe that—they was always talking about the trip to Florida.

Q. Okay, so what else happened now? Or did anything else happen?

A. Mostly, you know, just having conversations.

Q. Okay. Did you still stay with them then after lunch?

A. Yeah, we went to . . . we dropped Dan back off at his office . . . excuse me, Dan drove his car. He drove back to his office. Yeah, and we followed him back to his office. He went back to his office; we went to Connaughton's house and we stayed there until about 10:00 o'clock that night.

Q. And where did you have dinner?

A. Connaughton's.

MR. BLOUNT: Who was there for dinner? The same group?

A. No. Dan had come in, but he left; he went [49] to go bowling. He was gone for a couple of hours. Joe and David had to go pick him up because he had too much to drink. I mean, he called home—Martha called him at the bowling alley and she sent them after him. He was pretty loose when he come through the door.

Q. You've seen people drunk before then?

A. Oh yeah, I'm a barmaid. I've even got 'em drunk.

Q. Okay. What else?

A. He come in, you know, and he was like, like I said, you know, pretty loaded, and he started talking about the campaign and everything, you know, and how good he felt about it because he knew he was going to win this election. He appreciated what we was doing and he couldn't wait until we all got away; that's when he went back on the subject. Then we got on the subject of the restaurant again, and we talked about food, and we was talking about my mother's cooking, you know—we got on the subject of the restaurant again, and how he was going to put us in the restaurant. At that time, it was 10:00 or 11:00 o'clock and I was tired, so we asked Dave Berry and Joe Cox to take us home.

Q. About 10:00 o'clock?

A. 10:00 or quarter after 10:00.

[50] MR. MASANA: I'm going to interject. What about the job you were promised?

A. Oh, when they promised me, you know, the secure job and everything, they also promised—they promised Patsy a job too.

(By Mrs. Long)

Q. That she would be in with Breedlove's Lunch, or cafe?

A. No, they promised Patsy a decent job, you know.

Q. That she would be (inaudible).

A. That she would be good up in Court. That come out of his own mouth. That come out of Dan's mouth; he said we need somebody like you up at the courthouse. Municipal Court.

Q. When did he say that? Which meeting, first, second or third?

A. Second, I believe. That's the same time he promised me the job (inaudible).

Q. Okay.

MR. BLOUNT: When you left there at 10:00 o'clock that night, have you heard from them again?

[51] A. I didn't. I don't know if my sister has been in touch, or if they've been in touch with her. I didn't hear from them any more until the detectives . . . the detectives called. They said they was . . .

MR. BLOUNT: (Inaudible)

A. 29th-28th or 29th. It was during the week that they was doing that investigation that the paper told about. The detectives contacted and (inaudible) up to the police station to question me.

Q. The detectives were the ones that called—did you seen Dan then, or . . .

A. No.

Q. Okay.

A. After I come back from the police station he phoned the house and I talked to him on the phone.

MR. BLOUNT: Obviously you can't give us any specific questions and answers, but did they ask you anything about whether you had any opportunity (inaudible)?

A. Yeah, cause when I went in, I asked them right off the bat—I said, alright, whose side are you on? They said what are you talking about? I said, well, this is like a war, either you're one one side or you're on the [52] other and I don't want to say nothing that's going to offend you, you know—I want to know whose side you're on. And they told me, you know, there was a politic . . . you know, involved politically involved, and they went on questioning me about the case. I explained to them the whole story, how it got off to this, or that, you know. They was embarrassed evidently.

MR. BLOUNT: (Inaudible) the questions?

A. I told them, whether they wanted to hear it or not, they had to listen to me. When I come back—I come back from the police station and Dan Connaughton called my house.

(By Mrs. Long)

Q. Now called which house? Your mom's, or yours?

A. My mother's.

Q. Okay.

A. My mother's. That's where I stay almost all the time.

Q. So you must have stayed at your mom's then rather than going back . . .

A. Yeah, it's right across the street.

Q. Oh, okay.

[53] A. That's the reason why I'm over there all the time.

Q. Okay.

MR. BLOUNT: And what did he have to say to you?

A. He said that he found out that I was took up town; that I was asked up town for questioning, and he was wanting to know what all they asked me. And I said you should know, you know, you caused all of it, you know. Me and him got into it. I told him—I said if it

wasn't for you I wouldn't be involved in this. I said, cause you said our names wouldn't be mentioned in all this. I said, you approached me; I didn't approach you. I said, you lied to me from the beginning. He said, I'm sorry you feel that way; he said it's not too late for you to change your mind and get back on the right side, because I told him I wouldn't cooperate, I wasn't going to go to Court and all this. I told him that I was against him, and I was against him being Judge and all that. And that's when he told me it wasn't too late for me to change my mind and get back on the right side of the bench. His side. We had a few ill words, you know (inaudible) and I hang up on him.

MR. BLOUNT: Did he know that you'd been [54] sitting in the Police Department?

A. He knew I was up there for questioning.

MR. BLOUNT: Did he know that you had said something about your meetings with him (inaudible)?

A. I told him I was going to tell everybody. I was going to let everybody know why. I said the only reason why, I said, you did this—I said it come out of your own mouth—I said, cause you want Billy and Dolan to resign. And I said when Dolan didn't resign, I said you got mad and brought all these charges on him. And he said, you're upset, you're upset. And I hang up on him. So then the day that Billy was arrested, that evening, he called—he called the house again. And he said I just wanted to see how you took the news about Billy getting arrested. I said what business is it of yours how I feel about it; I said I ain't got nothing to say to you. He said well, I thought you'd like to know that your name was typed on the warrant, you know, served to Billy, and I got really upset over that then.

Q. Did he tell you that there were other names typed on that warrant?

A. No. He just . . . he had me going into fits over some of the things he said. He said, it's you . . . it's [55] all about you. You (inaudible). Just wanting to upset

me more; that's what the phone call was about, you know. He just kept on saying you've got to go to Court now, you've got to go to Court now, you know. And I told him, I said you tricked me. I said it wasn't supposed—the names wasn't supposed to be mentioned; you promised me this, you promised me that. We got into it and everything on the phone, and then right before I hang up, he says Alice, he says, why don't you change your mind. he said, and get back on the right side; he said, get back on my side. I said no.

Q. Well now had you said that you were not going to cooperate at all? Is that why he kept saying get back on my side?

A. I told him I didn't want no part of this, and I didn't want to go to Court, and I wasn't going to go to Court.

Q. Do you have any (inaudible)?

MR. BLOUNT: (Inaudible) any questions?

A. All I want is to leave me alone. I didn't voluntarily go up there, you know, until . . . those people approached me; they promised me different things. Everything they promised me they didn't go through on it. And all he was trying to do by this, is like he wrote a letter to the [56] editor the other day in the paper, and people was hollering that it was dirty politics. That's all it is. It come right out of his own mouth; he told me—it's not hearsay, it's what I heard with my own ears; he said he wanted to get ev . . . scare them into resigning. That's what he said. And when that happens, there wouldn't nothing more be said about it, he said.

MR. BLOUNT: What do you think will happen when we call him? Will he deny ever having met with you? Or calling you?

A. He won't deny meeting with me, but he'll deny probably what I'm saying. Because he told me on the phone, he said, you're upset, you don't know what you're saying; I know exactly what I'm saying.

MR. BLOUNT: You've had some time to think about this. I mean, obviously—at least two weeks or more.

A. And I've been wanting to say something, you know, from the beginning, but the way he lies and everything, I was scared to death, you know, well, if I say anything, if I don't, you know, ask somebody if it's alright if I talk, you know, I was afraid he could throw a charge on me, you know, or something. It's none . . . it's all the [57] truth, you know. But him being a lawyer and everything, I wanted to make sure he couldn't get me in trouble for speaking.

Q. Now, all the times that he came and picked you up, or took you places, did you go on your own?

A. Yeah. But I was, you know . . . my sister, she is one of the reasons why I talked to him and everything, you know, because she kept on telling me Alice, it's alright, just talk to them, tell them what they want to know; they already know everything Alice, so you might as well talk to them.

MR. BLOUNT: Obviously, we can't quote your sister from you (inaudible). What's your sister's position in this, would she support you or would she support him? In other words, if somebody said to her, who's telling the truth here?

A. She'll tell you about the trips, the dinner at the Maisonette, the jobs and everything. She'll tell you that's the truth, because they was offered to her too.

MR. BLOUNT: Does she know that you're here today?

A. I haven't talked to her today.

Q. Did she know that you were planning on [58] getting with us?

A. I kept on telling her, you know, that I was going to talk to the Journal News (inaudible) listen to me—get the whole story because the Enquirer like I said, has been calling there to the house. They've just been trying to put words in my mouth; they won't print what I told them, you know, they just print what they want to print.

Q. Now, you would . . . would Dan tell us that you were a friend when we ask him about this going on vacation and stuff like that?

A. I don't know if he thinks a man's a friend now after the way I talked the last time he was on the phone.

Q. Did you feel like a friend towards him, like maybe in the second meeting, or the third meeting, that sort of thing?

A. I just thought, you know, our names wouldn't be mentioned, and we'd get something out of it.

MR. BLOUNT: Obviously, we'll proceed from here, and Pam will, of course, write the story.

(Inaudible).

A. I just want people to know. Because they shouldn't vote for a man that is this dirty, you know, because I call it blackmail, what he was trying to do.

[59] Q. Blackmail of Judge Dolan?

A. Umm-hmm. I mean, Mr. Dolan was, like I said, as far as I know, he's got nothing to do with this, you know, this case and everything. And what a perfect time for him to bring all this up; you know, right before election and everything. That's all it is, it's just this election. He's just trying to win his way up on the bench that way, and I think the people's got the right to know what kind of man he is.

MR. BLOUNT: Again, for the benefit of the tape, and for everybody's benefit right in this room, were you coached in any way in what to tell us? Did anybody suggest that you . . .

A. No.

MR. BLOUNT: . . . tell us. What you told us is what you've already told people of what you want . . .

A. What I've been wanting to tell somebody from day one, you know.

MR. BLOUNT: And we made no promises to you?

A. No. If you made any promises to me, I'd hit the door.

MR. BLOUNT: We might give you an extra [60] copy of the paper, but . . .

A. I really tricked you into that.

Q. Did you realize at the time he was starting to make these offers to you that something wasn't right?

A. I knew it wasn't right, you know, but . . .

Q. Would you have taken it though? At the time?

A. If my name would have never been mentioned. I mean, you know, you want the honest truth.

Q. Sure.

MR. BLOUNT: Did you think that this was just the way the system worked?

A. I think that's the way it works.

Q. Okay, now, when you were in Court with Mr. New, did you think anything was unusual there? I mean, would you have gone and told somebody else? If the Connaughtons hadn't gone and talked to you, would you have gone and talked to, like say, the Prosecutor or somebody else?

A. No, I mean, you know, cause I went into Court, you know—I faced charges, you know.

MR. BLOUNT: And you understood why you were there, I mean . . .

Q. You didn't see anything . . .

[61] MR. BLOUNT: Did you feel like . . .

A. Well, like I say, you know, even the first time I went to Court, you know, when we first started, you know, which was assault and everything, I served two-and-a-half days in the county jail and everything—I did my time, you know.

Q. Who represented you the first time that you were in Court?

A. Matt Crehan.

MR. BLOUNT: Now has Matt ever said anything to you either for or against Judge Dolan? In this campaign?

A. No, I just, you know (inaudible).

MR. BLOUNT: And you haven't talked to him?

A. No.

Q. Do you know what Matt Crehan's leanings are, in terms of this race?

A. (Inaudible) I hope he's on the right side.

Q. I mean, you don't know—you don't know which one he supports?

A. I can't speak for him personally, no.

Q. Have you heard which side he supports?

A. I guess Dolan—I hope. I hope (inaudible).

[62] MR. BLOUNT: What would happen if we called your sister—would she talk to us? Or would she be upset with you? Or would she be upset with us? Or both of us? Or . . .

A. I think she's scared right now to talk to anyone, because the Cincinnati Enquirer has been trying to get her to talk to them. She's getting scared now since this is all reality. My sister is . . . sh's kind of weakminded when it comes to anything like that. She won't do nothing for nobody unless she thinks she's benefitting from it. And she honestly thought she was getting a job out of this, and would make something of herself out of this. And The Connaughtons just used her all the way. And now since she's seeing that it's coming down to where she ain't going to get nothing out of it, she's brought up in the middle of all this and everything, she's scared.

MR. BLOUNT: Now in looking at the list of the people who were subpoenaed for the Grand Jury, most of them would be neighbors of yours, right?

A. Yeah.

(By Mrs. Long)

Q. Who are they? Did they all have cases?

[63] MR. MASANA: (Inaudible).

Q. Okay. We could review the list. Okay, Patsy is your sister; June Taylor was the person that submitted the name; James Smith lives on Edison Avenue, do you know him?

A. No.

Q. Does Patsy know him?

A. (Inaudible).

Q. Does—do you, or Patsy, or your mother know Evelyn West?

A. I never heard of her.

Q. Okay. Ray Davis?

MR. MASANA: He's from (inaudible).

Q. City Loan—yeah, that shouldn't have . . . Jerry Day lives on Shuler Avenue—how close to you is that?

A. Patsy, she used to live in that building. I don't know the man, you know, but I know the address. There's a few apartments in that building.

Q. Okay. So do you know if she knows Jerry?

A. I would imagine she does.

Q. Okay. Well does she know about his case in Court?

A. I don't know whether I should say or not.

[64] Q. I don't think there'd be a problem—if you know. I'm not going to ask you details of that case, but if she knows about it.

A. Yeah.

Q. Okay.

MR. BLOUNT: Your mother is Brownie Breedlove?

A. No, that's my father.

MR. MASANA: (Inaudible).

MR. BLOUNT. Dorlin Breedlove is your . . .

A. Is my brother.

MR. BLOUNT: Is your mother's name on it?

A. No.

Q. Who's Nancy Breedlove?

A. That's Dorlin's wife.

Q. Did they have any cases with the Court?

A. My sister-in-law did.

Q. In Dolan's Court?

A. (Inaudible).

Q. With Mr. New?

A. Please?

Q. Was Mr. New the bailiff at the time?

A. Yeah.

[65] Q. Okay. Irene McGuire, do you know her?

A. (Inaudible).

Q. Who is she?

A. A friend of mine's mother.

Q. Was she in Court?

A. No.

Q. Do you know how she's related to this case?

A. Yes, but I don't know if I should say.

MR. MASANA: You can say.

A. They wanted to know where I got some money at (inaudible).

Q. Okay. Barbara Wyatt?

A. My sister.

Q. Okay.

MR. MASANA: You'll find that this is really a family affair.

MR. BLOUNT: So it seems.

Q. Okay. Was she in Municipal Court?

A. No.

Q. Okay. How is she involved?

A. I don't know. (Inaudible).

Q. Okay. Sheila Charles?

A. I've never heard the name.

[66] Q. Okay. Thelma Gold . . . well. Ray Rawlings?

MR. MASANA: He's the bondsman.

Q. Tom Rawlings must be too.

MR. MASANA: Both of them are.

Q. Okay. Carol Cope?

(No audible response.)

Q. You don't know her at all?

(No audible response.)

Q. Okay. Pamela Esposito?

(No audible response.)

MR. BLOUNT: Did you use Ray or Tom Rawlings as a bail bondsman?

(No audible response.)

Q. John Schriefer?

A. Schriefer, ex brother-in-law.

Q. Who was he married to?

A. Patsy. Patsy Stephens.

Q. She's since been remarried then?

A. No, she went back to her former name. Stephens was her name before she married Schriefer.

Q. Oh! This is a second marriage then for your parents?

A. No, it was Patsy's second marriage. She [67] went back . . . her maiden name was Breedlove, then she married a Stephens, and then she married a Schriefer, so she divorced Schriefer, she went back to Stephens.

Q. Oh! Okay. Now was he ever in Court?

A. Yeah.

Q. With Dolan and . . .

A. I don't know if he was with Dolan—I guess he was with Dolan. I can't say for sure, cause I don't know.

Q. Okay.

A. Positively for sure.

Q. Did Detective Sergeant James Schmitz and Lieutenant Charles Reed talk to you?

MR. BLOUNT: They weren't the two that . . .

MR. MASANA: (Inaudible)

Q. Who talked to you down there?

A. Kilgore and Rose.

Q. Kilgore and who?

A. Rose.

Q. Rose. Okay. And they only talked to you once?

(No audible response.)

Q. And the only other connection that you had with the case then was when you received your subpoena [68] for the Grand Jury?

(No audible response.)

Q. You don't know . . . did you know that there were other people that were . . .

A. Yeah, the detectives told me.

Q. That there were other people they were interviewing?

A. (Inaudible).

MR. BLOUNT: It there anything that we haven't asked you that you want to tell us?

A. No, just that I want everybody to know the truth.

MR. BLOUNT: Now do you understand that your name will be used with this?

A. Yeah. Can't get any worse than what Dan (inaudible). Makes it sound like I'm the bad guy.

Q. Have you had any repercussions from this?

A. I've been under a lot of (inaudible) strain. I guess.

Q. Other people calling you besides the Enquirer?

A. Yeah. I've had people that I thought were my friends call me and accuse me of being a snitch and a rat. [69] I don't like to carry that name, and that's what a lot of people is thinking. That knows me.

MR. BLOUNT: They were just mad, they didn't threaten you?

A. (Inaudible) a snitch. You name it, and I'm that. I just want to get that cleared up.

Q. I assume that you're not working for Connaughton's campaign?

A. No.

Q. Okay. Is Patsy working for Connaughton's campaign?

A. Not that I know of.

Q. Are your parents or any of the other people that are on that list working for his campaign?

A. The ones that I know (inaudible).

MR. MASANA: June Taylor is working for his campaign?

MRS. LONG: Yes, I know that.

MR. BLOUNT: We didn't have to ask that.

A. I was talking to her about (inaudible).

MR. BLOUNT: We'll proceed from there (inaudible) Mr. Masana. We'll call (inaudible) when this is transcribed. (Inaudible) she's got [70] some questions. We will not play the tape and I will not mention Mr. Masana. (Inaudible) she'll call and ask him some ques-

tions based on the information given (inaudible) and I don't want you to be surprised.

A. Yeah. Yeah, he may expect that.

MRS. LONG: He may deny a lot—a lot of what you said, or play it down. I shouldn't say that—not to say that that's a . . . I don't know him, to say that that's the type of person he is.

A. That's just like he told me on the phone that I was upset and I didn't know what I was talking about.

Q. But generally in confrontation situations we run into that kind of response. Okay. So that you know ahead of time.

MR. BLOUNT: Do you think that he knows that you're talking to us?

A. I told him that. The last conversation we had, you know, when we got into it.

Q. That was after you had talked to the police?

A. Ummm-hmmm. I told him that everybody was going to find out, you know, how he tricked me into all [71] this, and everything. I'm going to tell the papers; I'm going to tell everybody I can.

Q. Did he ever tell you that you were the strongest aspect of his case against Mr. New or Mr. Dolan?

MR. MASANA: Really, Patsy is, I think . . . Patsy, in all these cases, she recruited all these people. (Inaudible) Patsy recruited all these people.

Q. So Patsy was the one who gave him those names?

(No audible response.)

Q. Yeah, that was one of the things we noticed. Okay.

MR. BLOUNT: Thank you very much.

AND THEREUPON THE INTERVIEW IS TERMINATED.

DEFENDANTS' EXHIBIT M

Readers' Letters

Time to Focus on Issues in Municipal Court Race

EDITOR:

I respect the decision of the *Journal-News* to handle the story of the tax lien placed against my property.

Having been informed that a lien had been filed, the only conscientious journalistic approach was to do the story. Such is the nature and virtue of our free press.

There are many more pertinent issues to be discussed in regard to the election for municipal court judgeship. These issues hit on the relationship of the court to the community—such as the lack of even-handed administration of justice and the implementation and resulting impact of Ohio's new drunk driving law.

The Ohio Legislature, in enacting laws by which we are governed, does not remove all discretion from the judge in the rendering of decisions and the meting out of penalties.

For most people the municipal court is the first and only contact they have with the judicial system.

Therefore, the ability of the municipal court judge to render fair and objective decisions, unaffected by political pressures, friendships, or favoritism, is crucial to the perpetuation of respect for the courts and the legal system in general.

The voters do, nonetheless, have a right to know the facts about their candidates.

Having entered into the political arena, it is not only my obligation, but my duty to be forthright with the public.

A tax lien was, in fact, placed against my property for a partial non-payment of my 1981 tax obligation. This lien had nothing to do with a failure to file returns or any wrongdoing on my part.

In fact, the lien was the direct result of information provided by me in my tax returns and not derived from an audit.

The pressures of the recession have placed a great strain on everyone. Attorneys, who are entirely dependent upon the ability of their clients to pay their fees, are no exception.

As an attorney, it has never been my policy to deny representation to those truly in need because of their immediate inability to satisfy their fees.

The lien has been satisfied, and my taxes are in order.

Having closed this matter, it is now time to focus on the real issues of the campaign.

Dan Connaughton
Hamilton, Ohio

(EDITOR'S NOTE: Connaughton is a candidate for judge of the Hamilton Municipal Court.)

DEFENDANT'S EXHIBIT N**IRS Files Tax Lien Against Candidate**

By PAM LONG
Journal-News Writer

The Internal Revenue Service has filed a federal tax lien on property owned by a candidate for Hamilton Municipal Court judge and his wife, because of more than \$7,000 of unpaid income tax from 1981.

The IRS filed the lien July 13 in the county recorder's office against property owned by Daniel E. and Martha J. Connaughton. The lien lists the Connaughtons' address as 119 Court St., Hamilton, which is Daniel Connaughton's law office. The Connaughtons live at 148 E. Fairway Drive.

The lawyer is a Democratic candidate for the Hamilton Municipal Court judge's post. Incumbent judge, James H. Dolan, a former Democrat, avoided a primary battle by filing for reelection as an independent.

Connaughton indicated the filing of a lien "was a complete surprise. It was a balance I was trying to work out," he said.

"I'm not saying I wasn't negligent in taking care of it. I don't believe in sidestepping the thing," Connaughton said.

Connaughton said he did pay his 1982 taxes.

"The lien is the first public notice to other creditors that there is a debt owed to the United States," said Gary Blomberg, chief of the IRS special procedures staff.

"It is a way of putting the world, if you will, on notice," Blomberg said.

The \$7,167.52 lien represents the amount of taxes, penalties and interest that were unpaid as of July 13. The

IRS does not issue subsequent statements when part of the balance is paid, Blomberg said.

The back taxes are owed only on the Connaughtons' 1981 income, and their legal liability did not begin until Aug. 16, 1982, IRS officials said.

Because the collections statute runs six years, the lien remains in effect for six years and one month, expiring Sept. 15, 1988, according to the lien notice.

DEFENDANT'S EXHIBIT P

8-12-85

10:25

Patty Stevens states that

- (1) Dan Connaughton told her about a month ago that The Journal News wants to settle out of court for \$3,000,000 but he was going to see it thru because they want an apology and The Journal wouldn't apologize.
- (2) P.S. During the first night we talked in Sept., 1983, Dan said that he would play the tapes for Judge Dolan and Billy New and they would resign and it would be all over with and no one else would hear the tapes.

/s/ Patsy F. Stephens

WITNESS:

1. Alice Thompson
2. Charlene McGinnis

Sworn to and subscribed in my presence this — day of Aug., 1985.

/s/ James D. [Illegible]
Notary Public

DEFENDANT'S EXHIBIT W

No Charges Considered Against Court Candidate

BY JOHN R. CLARK

Hamilton Bureau Chief

HAMILTON—Butler County Prosecutor John Holcomb said Wednesday that no criminal charges are being considered against attorney Daniel Connaughton whom a woman claims promised her jobs and trip for information about the operation of Hamilton Municipal Court.

Alice Thompson, 22, 1740 Shuler Ave., told *The Enquirer* Tuesday that Connaughton, who is seeking election as judge of the Municipal Court in next Tuesday's balloting, promised to "find a suitable job" for her sister, Patsy Faye Stephens, 32, 1757 Shuler Ave., and to help her find employment.

ASKED WHETHER Thompson's accusations against Connaughton could be the basis of possible criminal charges against Connaughton, Butler County Prosecutor John Holcomb declared, "absolutely not."

"That woman (Thompson) never told the police or me any such tale. But be that as it may, everything she did tell us has been independently verified by other witnesses and by records and no where did I see or hear that Connaughton urged her to lie. The way I understand it, he just wanted her to tell what she knew."

Connaughton, who is seeking to unseat incumbent Judge James H. Dolan, denied Thompson's allegations. He said "no promises or inducements of any kind were offered to Alice Thompson by me or anyone connected with my campaign in exchange for the information she revealed."

"What she revealed to us she confirmed to the Hamilton Police Department approximately two weeks later when they were conducting their investigation (into the New case)," Connaughton said.

THOMPSON CONTENDED that during one meeting with Connaughton and others, she was asked how good a cook her mother was and was told the Connaughtons had been thinking of opening a restaurant at the old Counsel Chambers Bar, adjoining Connaughton's office. Thompson said the Connaughtons told her that her parents could run the restaurant and the girls (she and Patsy) could work there.

Connaughton denied there was any discussion of a restaurant but admitted there was some comment regarding the possibility that his wife might open a small ice cream shop or delicatessen in the building, and that possibly a job might be available there.

Earlier Tuesday, Thompson appeared before the Butler County grand jury to testify regarding three charges of bribery brought against Billy J. New, former director of court services for Hamilton Municipal Court. The charges stemmed from an investigation by police following a complaint by Connaughton.

The jury is expected to report its findings to the court on Friday.

JOINT EXHIBIT I

JOURNAL NEWS

Bribery case witness claims jobs, trips offered

By PAM LONG
Journal-News Writer

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A woman called to testify before the Butler County Grand Jury in Billy Joe New bribery case claims Dan Connaughton, candidate for Hamilton Municipal Judge, offered her and her sister jobs and a trip to Florida "in appreciation" for their help.

Alice Thompson, 22, 1740 Shuler Ave., was scheduled to testify before the grand jury in relation to the charges against New, who resigned his court position Sept. 22.

Thompson said she believes Dan Connaughton, a candidate for municipal judge, used "dirty tricks" in obtaining her cooperation with his personal investigation of New.

Connaughton, in an interview with the *Journal-News* Monday, confirmed meeting with Thompson.

But he denied any wrongdoing and said Thompson misinterpreted comments and discussions while attending meetings with him and persons involved in his campaign who were gathering information about New and Dolan.

Connaughton filed a complaint with Hamilton police Sept. 27, about New, former director of court services for Hamilton Municipal Court Judge Dolan.

Dolan—who is seeking re-election Nov. 8—fired New Sept. 22.

New, 32, 360 Foster Ave., Hamilton, was arrested Oct. 3 on three counts of bribery. He was bound over to the grand jury by Acting Judge Jack Rosmarin Oct. 14.

New had worked about six years for Dolan, who removed himself from hearing the case in municipal court.

Thompson's statements were made last week in a tape-recorded interview with *Journal-News* representatives. Through a third party, she had contacted the *Journal-News* to ask for a chance to tell her side of the story.

She was interviewed by the newspaper with the understanding that she not discuss her contact with New in Hamilton Municipal Court because that would be covered in her testimony this week before the grand jury.

Thompson said her reason for wanting to talk to the *Journal-News* were:

- 1. To let people know she did not "snitch" on New.
- 2. To reveal the "dirty tricks" Connaughton pulled to get her to make a statement.

She said two other things bothered her about Connaughton's actions: (1) he did not protect her anonymity as promised and (2) he allowed other people to hear tapes of a session with Connaughton and other supporters about what happened with New during Thompson's recent appearance in Hamilton Municipal Court.

Connaughton, some of his supporters and two neighbors were contacted by the *Journal-News* Monday to obtain their recollections of the meetings and conversations.

They claimed there was never any direct offer to Alice Thompson and her sister Patsy Faye Stephens, 32, 1737 Shuler Ave., Hamilton.

Connaughton did admit there was talk about the two sisters working in an ice cream shop the Connaughtons might open.

Thompson and Stephens were subpoenaed among 25 people to appear before the grand jury this week.

In her interview with the *Journal-News* Thompson said there were three meetings and two phone calls initiated by Connaughton, his wife or his brother-in-law Dave Berry.

Thompson, who is represented by lawyer Matt Crehan, a Dolan supporter, is uncertain of the dates the two meetings were held.

She claims that sometime in late August or early September she walked in on a meeting in progress at the home of her parents, Zella and Brownie Breedlove, 1767 Shuler Ave.

Present at the meeting were Zella Breedlove, mother of Patsy Stephens and Alice Thompson; Stephens; Berry; Martha Connaughton (Dan Connaughton's wife); and Joe Cox, head of the Connaughton's campaign, she said.

Berry said he and Martha Connaughton wanted to talk with Stephens and went to the Breedlove house unannounced.

Thompson claims her sister was discussing Patsy's connection with New. Thompson said Martha Connaughton and Berry "knew all about me."

Thompson said she has been in Hamilton Municipal Court twice. In 1980 Dolan found her guilty of assault and ordered her to serve jail time.

In February 1982, Dolan found her guilty of petty theft from K mart on Dixie Highway. Thompson said she was fined, but not given any jail sentence.

Thompson said she became involved because her sister, Stephens, had contacted June Taylor in September 1982, giving Taylor information on DUI cases in Hamilton Municipal Court.

Taylor passed the name along to Martha Connaughton, Berry said.

Berry and Connaughton's wife claim that first meeting was Sept. 15 and Cox was not there.

Connaughton places the date at Sept. 8, noting his wife told him about the meeting with Stephens and Thompson.

Connaughton said in a letter to the editor published Sept. 20 in the *Journal-News*: "Sept. 17, 1983, I met with this individual. Prior to Sept. 17, 1983, I did not know this person, nor had I known any of the information I was then told."

The second meeting took place either Sept. 16 or Sept. 17 at 12:30 a.m. at Connaughton's home at 138 E. Fairway Drive in Hamilton, according to Connaughton and his supporters.

Thompson, Connaughton and others agree on who attended the meeting.

Those present at the late-night meeting were Thompson, Stephens, Dan Connaughton, Martha Connaughton, Berry, Cox, Ernie and Jeanette Barnes.

Connaughton explained this second meeting was held at 12:30 a.m. "to protect their (the two sisters') anonymity," and because both women were employed at Rinks and worked late.

The *Journal-News* learned that Stephens had been employed at a Rinks warehouse.

Thompson said she has been unemployed for eight months and last worked as a waitress.

The sisters were picked up at Breedlove's home by Berry and Cox, who took them to Connaughton's home.

The Barnes reside across the street from the Connaughtons. The Barnes said they had been asked by Berry and Martha Connaughton to be witnesses "to something very important." Berry had told Jeanette Barnes.

Jeanette Barnes, who was not active in the Connaughton campaign at the time of the second meeting, now is active in the campaign.

During the session, Connaughton supporters said two tape recorders ran. Thompson said there were three tape recorders.

Thompson claims the tapes were turned off and on during a session she claims lasted until 5:30 a.m. When the tape was turned off, she said Connaughton made promises about a job and a post-election trip to Florida for Thompson and Stephens which the Connaughton family was going to take.

The Barnes claim the tapes ran continuously.

Dan Connaughton said there were times when the tapes were stopped.

Thompson said that either at that second meeting or a subsequent third meeting Connaughton offered:

- A job for Thompson in appreciation for her help with Connaughton's investigation of Billy New and Judge Dolan.
- a municipal court job for Stephens.
- an invitation for Thompson and her sister to go on a post-election trip to Florida with Connaughton and his family.
- to set up Thompson's parents, Zella and Brownie Breedlove, in the restaurant business at the location of Walt's Chambers, which Connaughton owns and leases. The property is on Court Street opposite the Butler County Courthouse and next to Connaughton's law office.

Connaughton and his supporters claim no promises were made.

Connaughton said he suggested the two sisters may want to go South.

Connaughton said his wife had thought about opening a gourmet ice cream shop at the Walt's Chambers location.

Martha Connaughton said "a job was never promised."

She said the shop was "a dream" she's had for a year, but there are no plans to open a shop. She admitted "after this is all over with I would give them jobs. They deserve a break. That's the social worker in me coming out."

In her interview with the *Journal-News*, Thompson said she would have accepted the trip and the job.

Thompson said she was notified of a third meeting Sept. 21 when Berry called and said he needed to pick up Thompson and her sister.

The morning of Sept. 22 the two sisters were taken to Linda Berry Interiors, 1188 Hamilton-Cleves Road, where Stephens underwent a polygraph test, according to the Connaughton[s] and Thompson.

Linda Berry is Dave Berry's wife.

Connaughton said the test was administered by Carl E. Anderson, a polygraphist from Cincinnati.

Thompson said she was encouraged by Cox, Berry, and Martha Connaughton to take the test. She refused.

Berry claims Thompson was not asked to take the polygraph test.

Connaughton said he waited to file charges until Sept. 27, because he wanted to get the results of the test back. Connaughton had not stayed for the entire polygraph exam.

Berry said Anderson had verbally told Berry that same day that Stephens passed the test.

Connaughton said his wife, Cox, Berry and the two sisters came to his office to pick him up for lunch.

Connaughton learned of New's resignation at his office through Jim Ceory [sic], a lawyer.

Then some of the group went to the Bob Evans Restaurant on Colerain Avenue (U.S. 27), near Northgate, for lunch.

Connaughton said they went to that location in Hamilton County "to try to protect their (Thompson and Stephens) anonymity."

Thompson claimed that Connaughton promised a post-election dinner at the Maisonette in downtown Cincinnati.

Connaughton said "it may have been discussed. I wouldn't say it wasn't discussed."

Thompson claimed Connaughton had told her the tapes he made of her and her sister's statement Sept. 16 or Sept. 17 were to be presented to Dolan.

Thompson said Connaughton hoped to get New and Dolan to resign and then to have himself appointed as municipal judge.

Thompson said that when Dolan did not resign when New was fired, Connaughton became upset and said he was going to file charges. Thompson said she was angry about the prospect of charges being filed and she said she asked for immunity.

Connaughton claims he never told Thompson he was going to file charges.

Connaughton said Butler County Prosecutor John Holcomb assured him immunity would be given. Connaughton said he told Thompson she would have immunity.

After the complaint was filed, Thompson said Hamilton police detectives called her in for an investigation. She claims she told the police about the offers Connaughton had made, but officers weren't interested in discussing it.

Connaughton called her later that day Sept. 28 or Sept. 29 after she talked to police detectives. She said Connaughton had heard about the investigation and wanted to know what had happened at the police department.

"Me and him got into it. I told him I was against him and I hung up," Thompson said.

Thompson said Connaughton called her Oct. 3, the day New was arrested by Hamilton police on three counts of bribery. Thompson was one of three people listed in the charges.

Connaughton claims he did not call her the day she talked to police detectives. He claims she called him and was hysterical.

(EDITOR'S NOTE: Other *Journal-News* reporters and editors participating in the interviews and research were Laurel Campbell, Tom Grant, Jeanne Brock, Sue Klearwetter, Jim Blount, Mike Jones, Bill Slabert, Larry Fullerton and Bob Walker.)

No. 88-10

Supreme Court, U.S.
FILED

DEC 1 1988

WILLIAM SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF PETITIONER
HARTE-HANKS COMMUNICATIONS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First and Fourteenth Amendments prohibit a judgment of liability in a defamation action instituted by a candidate for public office based upon a finding that the defendant engaged in highly unreasonable conduct constituting an extreme departure from ordinary standards of investigation and reporting.

2. Whether, in a defamation action instituted by a candidate for public office, the First and Fourteenth Amendments obligate an appellate court to conduct an independent review of the entire factual basis for a jury's finding of "actual malice"—a review that examines both the subsidiary facts underlying the jury's finding and the jury's ultimate finding of actual malice itself.*

* Pursuant to S. Ct. R. 28.1, *Harle-Hanka Communications, Inc.* states that its parent corporation is HHC Holding Inc. and that it does not have an affiliate or subsidiaries other than those that are wholly owned.

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BRIEF OF PETITIONER
HARTE-HANKS COMMUNICATIONS, INC.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 842 F.2d 825 and is included in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 28, 1988. A timely petition for rehearing *en banc* was denied on April 4, 1988, and the petition for certiorari was filed within 90 days of that date. Certiorari was granted by this Court on October 17, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Fourteenth Amendment, Section 1, United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On February 15, 1984, Respondent Daniel Connaughton ("Connaughton"), an unsuccessful candidate for the elected office of municipal court judge, instituted this defamation action against Petitioner Harte-Hanks Communications, Inc., the publisher of the *Journal News* (collectively the "*Journal News*"), a daily newspaper of

general circulation in Hamilton, Ohio.¹ The following summary of material facts is based on the evidence in the trial record, and is limited to documentary and other tangible evidence, undisputed testimony, and Connaughton's own admissions. Where material facts were disputed at trial, such disputes are resolved in favor of Connaughton for purposes of this *Statement of the Case*.

1. The Record Evidence.

In the November 1983 election for the office of judge of the Hamilton Municipal Court, the voters were asked to choose between two candidates—Connaughton, a Hamilton attorney, and James H. Dolan, the six-year incumbent. J.A. 19; J.A. 327, Exh. W. The municipal court, one of Ohio's busiest, handles between 20,000 and 23,000 cases a year. J.A. 40, 202. Hamilton has only one municipal judge. J.A. 212, Exh. 2, at 214.

For several months prior to the election, rumors had circulated in the Hamilton area linking Billy New, the director of court services for the Hamilton Municipal Court, with alleged corrupt practices in the administration of that court. J.A. 40, 143-44, 187-88; R. 359. Connaughton was circulating these allegations himself as early as July 1983. J.A. 130-32, 143-44.²

On September 17, 1983, between 12:30 a.m. and 4:30 a.m., two young women, Alice Thompson and her sister Patsy Stephens, met at Connaughton's home with Connaughton, his wife, his brother-in-law and three other campaign supporters. During this all-night session, Stephens and Thompson each claimed that they had par-

¹ Daily circulation in 1983 was approximately 29,000. R. 1,254. References to the Joint Appendix are denoted as "J.A."; references to trial exhibits are denoted as "Exh."; references to the trial record are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "App.".

² At that time, Connaughton told Area Court Judge Leslie Spillane and local attorney Matthew Crehan that he had "indictable" information that "would destroy Billy New and with him Judge Dolan." J.A. 143.

ticipated in making payoffs to New in return for which New "fixed" cases in the municipal court. J.A. 113; J.A. 219, Exh. 33; R. 356-57, 680-82. Stephens also claimed that some of these transactions had occurred in the presence of Judge Dolan. J.A. 221-22, 226, 228, 231-32. Approximately two-and-one-half hours of this meeting were tape-recorded. J.A. 107, 219; Exh. 34.

On the morning of September 22, 1983, Stephens was given a polygraph examination at Connaughton's request. J.A. 114; R. 156-58.³ Thompson refused to submit to a polygraph examination, but she accompanied her sister. J.A. 278, Exh. J, at 301-02. Stephens and Thompson spent the remainder of that day with Mrs. Connaughton, and they were joined by her husband for part of the day. J.A. 114; R. 448-49.⁴ On that same day, Judge Dolan asked for and received New's resignation. J.A. 247, Exh. G, at 249.

On September 27, 1983, Connaughton filed a private criminal complaint against New and Judge Dolan with the Hamilton Public Safety Director. J.A. 239, Exh. C. When Connaughton was interviewed by Hamilton police, he identified Stephens and Thompson as the sources of his allegations. J.A. 126. Hamilton police subsequently interviewed both Stephens and Thompson; New was later arrested and charged with three counts of bribery. J.A. 44-45, 185, 249.⁵

³ The trial court denied Connaughton's request that the results of the polygraph examination be admitted in evidence. R. 158, 834. Yet, the Court of Appeals credited those results in its rendition of material facts. See App. 8a.

⁴ Mrs. Connaughton met with Thompson and Stephens on one more occasion shortly after September 22. J.A. 114-15; R. 184-85. Thompson testified that she also had two telephone conversations with Connaughton, J.A. 165, but Connaughton remembered only one, R. 454.

⁵ New was subsequently indicted by a Butler County grand jury. J.A. 148. The grand jury's investigation expressly exonerated Judge Dolan of any wrongdoing. J.A. 63, 148-49.

The corruption allegations against New and Judge Dolan aired by Connaughton, the subsequent arrest of New, and the basis of and motivation for the allegations quickly dominated all other issues in the Hamilton elections. J.A. 42-47. The *Journal News* devoted extensive news coverage to the corruption allegations against New and Judge Dolan. J.A. 204. Connaughton focused his campaign advertising on this issue as well. J.A. 45.⁶

By Connaughton's own admission, Hamilton residents soon began to question his motives in pursuing the corruption allegations against New and Judge Dolan. J.A. 129-30; J.A. 240, Exh. D. In an October 19 letter published in the *Journal News*, Connaughton acknowledged that "a charge of 'dirty politics' ha[d] been levied [sic] against [him] by some members of the community," but denied that his "actions were purely political." J.A. 130, 240.⁷

On October 27, Blount and reporter Pam Long conducted a tape-recorded interview of Thompson,⁸ which had been arranged by a political supporter of Judge

⁶ One Connaughton campaign advertisement charged that Judge Dolan bore ultimate responsibility for "[a]ny failure to manage the court or its employees" and promised that Connaughton, in contrast, would "fulfill this most important job in a manner expected by our citizens." J.A. 45; J.A. 238, Exh. A.

⁷ On October 25, 1983, Judge Dolan visited the office of Jim Blount, the editorial director of the *Journal News*, and asked Blount whether the newspaper would cover a press conference if Judge Dolan called one. J.A. 18. Blount responded that the newspaper, as well as other news media, would probably report on a press conference if it were "legitimate." R. 53-54. Judge Dolan then initiated a discussion with Blount about the *Cincinnati Enquirer's* coverage of him and his campaign. J.A. 18. Although Blount, a longtime Hamilton resident, had been acquainted with Judge Dolan for more than 25 years, it is undisputed that they were not friends. J.A. 205; R. 582. Indeed, Blount often met with political candidates to discuss press coverage and campaign issues. J.A. 42.

⁸ A transcript of the tape-recorded interview is available for this Court's review. J.A. 278-321; Exh. L.

Dolan. J.A. 155-56; J.A. 278, Exh. J; Exh. L; R. 74-75.⁹ Thompson told the *Journal News* that Connaughton had offered her and her sister a vacation and a victory dinner at Cincinnati's expensive Maisonette Restaurant in appreciation for their help. J.A. 293-96, 302. She also claimed that Connaughton had offered to employ her and other members of her family in a restaurant to be opened in a building owned by Connaughton. J.A. 306-07. In addition, Thompson indicated that Connaughton had told the sisters he intended to play the tapes of the September 17 meeting to Judge Dolan so that he would resign in Connaughton's favor. J.A. 291-92.

Thompson further told the *Journal News* that she was upset because she had been publicly implicated in the investigation of New despite Connaughton's promise that she would remain anonymous. J.A. 36, 295-96, 302, 311-12, 319-20. In her opinion, Connaughton was guilty of "dirty tricks." J.A. 157, 162-63.¹⁰

⁹ Thompson had contacted New's attorney, Henry Masana, through an intermediary, and asked Masana to arrange an interview with the *Journal News*. J.A. 155-57, 160, 178-79. The Court of Appeals intimated that Thompson's allegations concerning Connaughton were prompted by Masana, who attended the October 27 interview and who, according to the Court of Appeals, "on a number of occasions refreshed [Thompson's] memory with leading questions and suggestions." App. 10a. Neither the tape recording of the October 27 interview nor a fair reading of the transcript supports such a characterization of Masana's conduct. See J.A. 278-321; Exh. L.

¹⁰ On Sunday, October 30, Blount's weekly "Editor's Notebook" column was published in the *Journal News*. J.A. 19; J.A. 207-11, Exh. 1. The column, which concerned the charges of corruption that had come to dominate the campaign, observed that "most voters consider" the race "a tough decision—and getting tougher," and added that "as the verbal firing continues" between the candidates, "more and more people will register their disgust and confusion with both men by refusing to vote for either candidate." J.A. 207. The column quoted comments by several undecided voters, including one who noted, "I resent voting for a person who . . . has been deceitful or dishonest in campaigning." J.A. 208. Moreover, the column reported that some observers were questioning the *Cincinnati Enquirer's* prominent placement at the top of page one of an article critical of Judge Dolan's practice of disposing of cases in chambers,

On October 31, Long and Blount interviewed Connaughton. R. 455-59, 462-63. The interview was tape-recorded and later transcribed. Exh. K.¹¹ During the interview, Connaughton initially denied promising jobs or a vacation trip to Thompson and Stephens, but then admitted the factual basis of Thompson's allegations. J.A. 264-66, 272-73. Connaughton conceded that during at least one of the meetings with the sisters, he and his wife had discussed the subject of employment with them.¹² Connaughton further confirmed that the possibility of a post-election victory dinner at the Maisonette Restaurant and a vacation trip were discussed as well.¹³

two days after the landing in Grenada by United States forces, a day after the propriety of that military action was questioned by members of Congress, and within a week following the deaths of more than 225 Marines in a terrorist explosion in Lebanon. J.A. 209.

¹¹ The transcript of this tape-recorded interview is available for this Court's review. J.A. 255-77, Exh. I.

¹² See J.A. 264-65 (emphasis added):

A. (By Connaughton) What was discussed in an off-handed way, the people who own that bar, who we're not very pleased with, their lease expires next September. My wife has the idea that she wants to open an ice cream type shop like Graeters, or some such thing as that, and I heard her discussing with them that maybe, since Patty had run this Homette Restaurant or something of that nature, that maybe she would help out and participate in the operation of this—whatever you want to call it—deli shop or gourmet ice cream shop. Yes, and I was present when that took place.

Q. And when was that?

A. Well, I don't think it was that night. As I recall, this was a later time that we had seen them.

Q. But that would only be for Patty (unclear)?

A. I guess Alice was there, and the offer may have been extended to her in that fashion, *that she could work there or something*—I wouldn't be surprised if that was said.

¹³ See J.A. 266, 272-73:

Q. . . . At lunch [on the day of Stephens' polygraph test] Thompson said that you promised to take her and her sister out to a post election victory dinner at the Maisonette?

[Continued]

During the interview, Connaughton also conceded that he had discussed with Thompson "my intention and hope that she could remain anonymous." J.A. 264. He added that, "I imagine she feels betrayed . . . [b]ecause she's not anonymous, and she probably felt that my representation, that maybe she could remain anonymous had been a breach of trust to her." J.A. 264. Finally, Connaughton confirmed that he had told Thompson that he would like to play the tapes of the September 17 meeting for Judge Dolan and New:

I probably said something like yeah, I'd like to go down there and let them hear this and see what they've got to say about it, you know. . . . I probably would have put an add-on and said, you know, God-damn, after they hear this they ought to just resign and quit. . . .

J.A. 263.

¹³ [Continued]

A. I promised to take them to the Maisonette? Hell, I haven't been to the Maisonette for years.

Q. Was it discussed? Was it brought up?

A. It may have been. I won't deny that some loose discussion in a kidding way was. . . .

Q. Did you compare Bob Evans [where the lunch was held] with the Maisonette?

A. No, we didn't make those comparisons, but if she said that was discussed, I wouldn't say that she was not telling the truth. If she says that I made a firm statement that we were going to definitely plan a party at the Maisonette, that's not true. . . .

* * * *

Q. What about this post election trip to Florida? Is there any possibility that they were, in an off-hand way, well, you know, you guys want to go, you know, you can go along, or something like that? . . . Did you talk about anything like that?

A. . . . I do remember in an off-handed way it being discussed or something that they ought to . . . they could go down to Hilton Head or Florida, or something like that, or maybe hide out or something like that, I don't know. But I own no property and have nothing to offer them.

Also on October 31, Mrs. Connaughton told a *Journal News* reporter that jobs and anonymity had been discussed with Thompson and Stephens. J.A. 98, 116; R. 405-06. Other Connaughton supporters present at the September 17 meeting, however, told the *Journal News* they did not hear, on that occasion, statements by Connaughton about jobs, trips, victory dinners, or anonymity. R. 114-16.¹⁴ It is undisputed that these participants did not hear all the conversations that occurred at the September 17 meeting and were not present at other meetings and conversations that occurred between the Connaughtons, Thompson and Stephens. J.A. 108, 114-15, 122, 157-59; R. 184-85, 367-68, 373-74, 448, 454.

As part of the *Journal News*' investigation, Blount also contacted Butler County Prosecutor John Holcomb. He assured Blount that, based on Holcomb's experience with Thompson, she was a credible witness and, in fact, was more credible than her sister. J.A. 47, 146-47. Blount also conferred with Hamilton police, who testified they too considered Thompson to be believable. J.A. 38, 186.¹⁵ Finally, Blount knew that Thompson was deemed sufficiently credible by Connaughton to convince him to file his own criminal complaint based entirely on the allegations of Thompson and her sister, and by the county

¹⁴ Curiously, Connaughton's brother-in-law testified that a vacation trip for Connaughton and his supporters and anonymity for Thompson and Stephens *were* discussed at various meetings with them, J.A. 158-59, and Connaughton's campaign manager testified that the Maisonette Restaurant *was* discussed between the Connaughtons, Thompson and Stephens, R. 381. Indeed, although Stephens testified to the contrary, R. 193, her mother testified that, on the morning following the September 17 meeting, Stephens told her that she and Thompson *had* been promised a trip, jobs, a victory celebration at the Maisonette, and anonymity, J.A. 181-84.

¹⁵ Blount also testified that he assigned *Journal News* reporter Tom Grant to ascertain if Thompson had repeated to police her allegations regarding Connaughton's promises, but that Grant was unable to do so. J.A. 37-38. Grant testified that Blount asked him only to determine whether the investigation of New was still ongoing. J.A. 88.

prosecutor and police to prompt the subsequent charges against New. J.A. 35-36, 44, 47, 240, 261-62.¹⁶

The *Journal News* did not interview Stephens. Blount and Long thought that Connaughton had agreed to have her contact the newspaper, and she did not do so. J.A. 57, 61; R. 106. Connaughton, however, testified that he did not agree to contact Stephens. J.A. 142. Nevertheless, it is undisputed that, in the newspaper's view, the confirmation of the factual basis of Thompson's allegations by Connaughton and his wife obviated any need to interview Stephens. J.A. 35, 57; R. 608, 611.¹⁷

¹⁶ Prior to publication, Thompson informed the *Journal News* that she had been convicted in Judge Dolan's court on charges of shoplifting and misdemeanor assault, information that the *Journal News* reported in the article at issue. J.A. 47, 280-83; J.A. 329, Joint Exh. I, at 331. Holcomb, the county prosecutor, testified that, "in many criminal investigation[s] a lot of the witnesses and a lot of the people involved have records. These people did too. . . . [W]hat [Thompson] told me, as I recall, I was able to verify." J.A. 146-47. During his October 31 interview with the *Journal News*, Connaughton suggested, "I think [Thompson has] been to Hughes," a local psychiatric hospital, and that "she's given to some emotional outbursts." J.A. 273. The *Journal News* did not report this information.

¹⁷ At trial, Stephens, a principal witness for Connaughton, initially denied that any promises or offers had been made to her. J.A. 62-63; R. 162. She further denied that Connaughton said he would confront Judge Dolan with the allegations against him. R. 160. She conceded, however, that the subjects of jobs, anonymity and a trip to Florida had been discussed by Connaughton, R. 180, 186-89, and that, during the September 17 meeting, Connaughton said, "I just wonder if [Dolan] would take and give his resignation instead of facing the public eye," R. 181. After Stephens' initial testimony, she executed an affidavit stating that, contrary to her earlier testimony, Connaughton had said during the September 17 meeting "that he would play the tapes for Judge Dolan and Billy New and they would resign and it would be all over with and no one else would hear the tapes." J.A. 326, Exh. P; R. 790. Accordingly, Stephens was recalled to the witness stand and testified to other representations allegedly made to her by Connaughton:

I don't think by telling me that when this is all over with, that—I don't think by saying that he's going to take and give me something out of his heart is a bribe and I don't take it as a

Based upon the foregoing investigation, *Journal News* editors decided that the newspaper should report the story. J.A. 51, 88; R. 248-49, 566-67. They decided to publish the article no later than November 1 in accordance with the *Journal News*' longstanding guidelines that prohibited the publication of new allegations regarding candidates for public office within one week of an election. J.A. 41; R. 617. Prior to publication, Blount asked the *Journal News*' outside counsel, James Irwin, to review the article and advise the newspaper as to its legal rights and obligations. J.A. 191-92.¹⁸

After reviewing the article and questioning the *Journal News* staff regarding its investigation, Irwin concluded that the newspaper was legally entitled to publish. R. 796-97. Blount advised Irwin that the prosecutor and police found Thompson to be a credible witness. R. 800. Moreover, Irwin noted that Connaughton had personally confirmed the substance of Thompson's allegations, "leaving only a question of interpretation [of Connaughton's comments to Thompson and Stephens] for the readers of the article." J.A. 192.¹⁹

bribe or a promise. You can look at things a million different ways. It's how a person feels within.

J.A. 73. When asked again whether there was any discussion with Connaughton regarding "playing the tapes, Judge Dolan resigning and your names never being used," Stephens replied, "I take the Fifth." J.A. 78. Stephens' conflicting testimony under questioning by both parties prompted the trial judge to comment that Stephens "is almost incoherent. . . . [S]he'll say anything you want her to say. I think this lady has some mental problems." J.A. 75-76.

¹⁸ Irwin is a former law school professor, special prosecutor, and acting judge, and, in 1983, had twenty-years' experience in the practice of law. R. 780-84.

¹⁹ Connaughton's principal contention in the Court of Appeals was that Irwin had "admitted" in deposition testimony that "I was told [during his prepublication meeting with the *Journal News*] that Dan Connaughton did deny making any offers and that [Thompson] misinterpreted his comments and discussions about the jobs and trips." J.A. 196. Significantly, the Court of Appeals declined to interpret that statement in the strained manner ad-

The article at issue appeared in the *Journal News* on November 1. J.A. 329-36; R. 617. It accurately reported Thompson's claims, but added that Connaughton "denied any wrongdoing and said Thompson misinterpreted [his] comments." J.A. 329. The article faithfully detailed the responses of Connaughton and his wife to Thompson's allegations.²⁰

Both Long and Blount testified that they had *no doubt* that the subjects identified by Thompson had been discussed by Connaughton. J.A. 55, 57-59; R. 628-29, 639, 778. They further testified that they reached no personal conclusions as to whether Connaughton's statements were intended as "inducements" to Thompson and Stephens. R. 628-29, 638-39, 778.

On November 3, Connaughton held a press conference that was the subject of a prominently displayed article in the *Journal News* the following day. J.A. 52; J.A. 243-46, Exh. F. At his press conference, Connaughton charged that Thompson's allegations were "outrageous and unfounded." J.A. 244; R. 525. He again conceded that "[t]here is no question but that the fact that certain words or key phrases have been mentioned—Maisonette, going south—but I do know that these were never, ever done in the form of an inducement." J.A. 245. Connaughton also admitted that he had promised Thompson

vocated by Connaughton. Indeed, Irwin repeatedly explained at trial, consistent with the testimony of the others present at the prepublication meeting, that it was the *Journal News*' understanding that Connaughton *had contended* that Thompson "misinterpreted his comments and discussion," not that Thompson had *in fact* misinterpreted Connaughton's statements. J.A. 195-96; R. 801-02, 810.

²⁰In addition, the article (1) disclosed that Thompson's admitted motive in disclosing these events was "[t]o let people know she did not 'snitch' on New," (2) accurately described Thompson's criminal record, and (3) reported Thompson's admission that she had refused to take a polygraph test. J.A. 329-36.

and Stephens anonymity "in so far as I had control." J.A. 246.²¹

Finally, on November 6, the *Journal News* published a qualified editorial endorsement of Judge Dolan. J.A. 250-54, Exh. H. The editorial noted the bribery charges pending against New "during Dolan's tenure" and stated that, as a result, "there is some reason to question the operation of the court, particularly the absence of adequate checks and balances throughout the system." J.A. 251-52. The editorial concluded that "a slight edge goes" to Judge Dolan, "with the admonition that, if elected, he must assume the responsibility for restoring public confidence in the administration of the court." J.A. 254.

Judge Dolan defeated Connaughton decisively in the November 8 election by a margin of 60 percent to 40 percent. R. 627.

2. The Verdict.

The first phase of the bifurcated trial in this case ended with a verdict on liability in favor of Connaughton. The verdict form, reproduced at App. 89a, asked the jury three questions: (1) was "the publication in question . . . defamatory toward the plaintiff?," (2) was it "false?," and (3) was it "published with actual malice?" The jury answered all three questions affirmatively. *Id.* There were no jury interrogatories.

The second phase of the trial concluded with a jury award to Connaughton of \$5,000 compensatory damages and \$195,000 punitive damages. R. 1334-35. The compensatory award reflected the only evidence of quantifiable financial loss introduced by Connaughton, *i.e.*, that his attorneys had incurred approximately \$5,000

²¹ The *Cincinnati Enquirer* also reported Thompson's allegations that she and her sister had been offered jobs and a trip by Connaughton. J.A. 327-28. In his interview with the *Enquirer*, Connaughton admitted that "there was some comment regarding the possibility that his wife might open a small ice cream shop or delicatessen in the building [owned by him], and that possibly a job might be available there." J.A. 328.

in expenses in prosecuting the case. R. 998. The district court subsequently denied the *Journal News*' motion for judgment notwithstanding the verdict and entered judgment on the jury's verdict. App. 82a-83a.

3. The Decision Below.

On January 28, 1988, a divided panel of the Court of Appeals affirmed the trial court's judgment. App. 1a-75a, 85a-86a. The panel majority recognized that it had a constitutional duty to conduct an independent examination of the record supporting the jury's finding of "actual malice." App. 30a-33a (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 492 (1984)). The majority reasoned, however, that the obligation of independent review applies only to the "ultimate conclusion of clear and convincing proof of actual malice" and not to "preliminary, operative, or subsidiary factual determinations," which are governed by a "clearly erroneous" standard of review. App. 33a.

Accordingly, the panel majority proceeded to infer the existence of eleven "preliminary" or "subsidiary" findings of fact that the jury could have made, but undertook no independent assessment of those findings. App. 35a-36a.²² Finally, the majority concluded that the "ultimate" finding of "actual malice" was supported by the eleven "subsidiary" findings that the jury could have made, because those findings demonstrated "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." App. 38a, 41a, 43a (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.)).

Judge Guy dissented in a lengthy opinion. App. 49a-67a. As Judge Guy observed:

The record shows that the *Journal-News* did not decide to publish Ms. Thompson's allegations until

²² The so-called "subsidiary findings" are discussed in detail at pp. 41-46 *infra*.

after plaintiff had confirmed that the discussions had taken place. I emphasize that plaintiff has never denied making these statements which appear in the transcript of his pre-publication interview. Even if the eleven subsidiary factual conclusions inferred by the majority are given the most damaging interpretation, they still cannot support a finding of reckless disregard of the truth in light of the plaintiff's own uncontroverted admissions.

App. 65a-66a.

SUMMARY OF ARGUMENT

The preservation of free and unfettered expression about the qualifications of candidates for public office, such as the speech at issue, is at the core of the First Amendment. See *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988). Indeed, the First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Public debate regarding candidates for public office is "integral to the operation of [our] system of government." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court adopted the "actual malice" standard to determine, in the context of defamation actions instituted by public officials and political candidates, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Id.* at 285 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Because "erroneous statement" is inevitable in political debate, the Court held it must be tolerated to assure the freedoms of speech and press the "breathing space" essential to their fruitful exercise. *New York Times Co. v. Sullivan*, 376 U.S. at 271-72. The "actual malice" standard is designed, therefore, to exclude from the realm of protected expression *only* those statements about public officials and political candidates published "with [a] high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

In this case, however, the Court of Appeals equated "actual malice" with "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," App. 38a, a retreat from *New York Times* rejected by this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974). As a result, the Court of Appeals erroneously permitted expression at the core of the First Amendment to be penalized.

The Court of Appeals' analysis also bespeaks a fundamental misconception of its constitutional obligation to examine independently "the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *New York Times Co. v. Sullivan*, 376 U.S. at 285 (citation omitted). Although the "actual malice" inquiry may turn on "largely factual questions," *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984), it "involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind," *id.* at 506 n.25 (quoting *Roth v. United States*, 354 U.S. 476, 498 (1957)) (emphasis in original). "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." 466 U.S. at 511. In such cases, "[j]udges, as expositors of the Constitution, must *independently* decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* (emphasis added).

According to the Court of Appeals' standard of "independent" review, however, even undisputed evidence negating a finding of "actual malice" must be ignored, all conceivable inferences from the facts adduced at trial must be drawn in favor of the plaintiff, and those adverse inferences must be cumulated, *before* the reviewing court considers whether "actual malice" has been demonstrated with convincing clarity. This is not the "*de novo*" review

contemplated by *New York Times* and *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. The obligation of independent review is satisfied neither by ignoring undisputed evidence favoring the defendant nor by drawing all possible inferences in favor of the jury's verdict.

Moreover, the standard of appellate review adopted by the Court of Appeals impermissibly credits, as a by-product of its process of "ritualistic inference granting," *Tavoulareas v. Piro*, 759 F.2d 90, 147 (Wright, J., dissenting in part), *vacated*, 763 F.2d 1472 (D.C. Cir. 1985) (en banc), evidence that should properly have little or no probative value in adjudicating the issue of "actual malice," including evidence that a newspaper (a) competes for circulation with other media; (b) editorially endorsed the plaintiff's political opponent; and (c) failed to interview one of many potential sources. Because such evidence is, at best, only tenuously probative of a motive to falsify, see *Henry v. Collins*, 380 U.S. 356, 357 (1965), a reviewing court must draw its own inferences based on the record as a whole, and not assume or credit inferences that, at least standing alone, cannot constitute "actual malice" as a matter of law. See *Hustler Magazine v. Falwell*, 108 S. Ct. at 881; *St. Amant v. Thompson*, 390 U.S. 727 (1968).

An independent review of the jury's finding of "actual malice" requires reference to only one piece of evidence, the undisputed text of the *Journal News*' prepublication interview with Connaughton in which he "confirmed the factual basis of Ms. Thompson's allegations." App. 58a (Guy, J., dissenting). The eleven "subsidiary findings" inferred by the Court of Appeals are wholly irrelevant to a proper independent review of this record. Indeed, an independent review of the record that is faithful to this Court's pronouncements in *New York Times* and *Bose* compels the conclusion that the expression at issue is protected by the First Amendment.

ARGUMENT

I. THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD TO DENY CONSTITUTIONAL PROTECTION TO EXPRESSION AT THE CORE OF THE FIRST AMENDMENT.

A. The "Central Meaning" of the First Amendment Mandates Constitutional Protection for Criticism of Candidates for Public Office.

This case, involving as it does a news report concerning a candidate for public office during the course of a highly charged election campaign, must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on those who seek or hold public office. *New York Times Co. v. Sullivan*, 376 U.S. at 270; accord *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Preservation of such free and unfettered political expression is commonly understood to be the value at the very core of the First Amendment. See *Hustler Magazine v. Falwell*, 108 S. Ct. at 879.²³ Whatever the outer limits of First Amendment protection, there is "practically universal agreement" that one of its major purposes was to protect "free discussion" of political "candidates." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

In *New York Times*, this Court elucidated the "central meaning" of the First Amendment—criticism of the government and those engaged in the political process is beyond the reach of state power to regulate or sanction. 376 U.S. at 273-76. Since criticism of government is "at the very center" of free discussion protected by the First Amendment, criticism of those who would assume

²³ Such political expression has always occupied "the highest rung of the hierarchy of First Amendment values." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

responsibility for government must likewise be free, "lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. at 85.²⁴ The right of the press to criticize political candidates cannot be suppressed, because to do so would impermissibly "muzzle[] one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills v. Alabama*, 384 U.S. at 219.

Debate regarding candidates for public office is "integral to the operation of [our] system of government." *Buckley v. Valeo*, 424 U.S. at 14. Moreover, in the "free society ordained by our Constitution," it is not the government, but the people "who must retain control" over the debate in a "political campaign." *Id.* at 57.²⁵ In essence, the First Amendment was designed to forbid the state, through any branch of government including the judiciary, from imposing on its citizens an authoritative version of the truth; it prohibits the government from interfering in the communicative process by which the citizens gather the information necessary to exercise their rights of self-government.²⁶ The First Amendment, there-

²⁴ See *Monitor Patriot Co. v. Roy*, 401 U.S. at 271 ("That *New York Times* itself was intended to apply to candidates . . . is readily apparent from the opinion's text and citations to case law.").

²⁵ See *New York Times Co. v. Sullivan*, 376 U.S. at 274 (in a republic, the "people, not the government, possess the absolute sovereignty") (quoting James Madison); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208. It has been suggested that defamation of government and those who seek to govern is not conceivable in a democracy and that the presence or absence of such a legally cognizable cause of action defines the society; i.e., a society that allows such expression to be sanctioned "is not a free society no matter what its other characteristics." Kalven, *supra*, at 205.

²⁶ See A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948) ("The principle of freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). Indeed, "the right of electing the members of the government

fore, has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. at 272; see *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971) ("[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule").

In this case, the challenged publication rests at the core of the First Amendment. Connaughton's corruption allegations against New and Judge Dolan, the subsequent arrest and indictment of New, and the basis of and motivation for the allegations were the major issues in the Hamilton elections. J.A. 42-44, 46-47. Connaughton sought to make political hay from the allegations and published campaign advertisements that charged Judge Dolan with ultimate responsibility for "[a]ny failure to manage the court or its employees." J.A. 45, 238. A candidate who attacks the integrity of his opponent and "who vaunts his [own] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. at 274; accord *Hustler Magazine v. Falwell*, 108 S. Ct. at 880.²⁷

constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *New York Times Co. v. Sullivan*, 376 U.S. at 275 n.15 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 575 (1876)).

²⁷ "Where politics and ideas about politics contend, there is a first amendment arena. The individual who deliberately enters that arena must expect that the debate will sometimes be rough and personal." *Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985). In the present case, Connaughton was well aware of this essential fact. In his letter to the editor published by the *Journal News* in July 1983, he acknowledged that "[h]aving entered into the

The public interest in the expression at issue is, therefore, at its zenith; the purely private interest of the plaintiff is at its nadir. Having chosen to enter the political arena and participate in the rough and tumble of public debate, Connaughton cannot convincingly be heard to complain when his own motives and conduct are the subject of public scrutiny. "The law of defamation teaches . . . that in some instances speech must seek its own refutation without intervention by the courts." *Koch v. Goldway*, 817 F.2d 507, 510 (9th Cir. 1987). Charges and counter-charges in the midst of a campaign for election to public office constitute "the precise sort of contest that society can endure without redress from the courts." *Id.* at 510.²⁸

political arena, it is not only my obligation, but my duty to be forthright with the public," because, as Connaughton himself admits: "The voters do, nonetheless, have a right to know the facts about their candidates." J.A. 322, Exh. M.

²⁸ This principle is graphically illustrated in the Dolan-Connaughton campaign. In late September 1983, Connaughton filed his criminal complaint against New and Judge Dolan. J.A. 239. Connaughton's complaint was publicly denounced as "dirty politics," which, in turn, prompted Connaughton to defend his actions and question Judge Dolan's failure to institute an investigation into New's alleged misconduct. J.A. 130, 240-41. Judge Dolan responded by asserting: "He claims that he is not guilty of dirty politics. Baloney!" J.A. 242, Exh. E. As one observer of Hamilton politics characterized the campaign, "you had the Dolan camp and you had the Connaughton camp and the Connaughton camp said things about Dolan and the Dolan camp was saying things about Connaughton." J.A. 149. On November 1, the *Journal News*, which had accurately reported each side's allegations throughout the campaign, reported Thompson's statements about Connaughton and Connaughton's responses. Three days later, the newspaper reported Connaughton's press conference during which he further responded to Thompson's allegations. J.A. 243-46. The Court of Appeals' suggestion that this last article provided additional evidence of "actual malice" because it "merely emphasized, through repetition, the magnitude of [Thompson's] accusations," App. 21a, is entirely alien to the First Amendment. See *Ocala Star-Banner Co. v. Damron*, 401 U.S. at 300-01.

B. To Ensure "Breathing Space" for Expression at the Core of the First Amendment, Only a Narrow Category of Speech Is Beyond the Scope of Constitutional Protection in a Defamation Action Instituted by a Candidate for Public Office.

Since criticism of political candidates is entitled to the most uncompromising First Amendment protection, this Court has been vigilant to ensure that only an extremely narrow category of such expression can be subjected to liability in defamation—statements published with "actual malice," i.e., with "knowledge" of their falsity or with "reckless disregard" for the truth. *New York Times Co. v. Sullivan*, 376 U.S. at 280. A review of this Court's "actual malice" jurisprudence reveals that the *New York Times* standard does not serve as a standard of care, nor is it to be invoked to punish instances of journalistic misconduct. Rather, "actual malice" is a delicate instrument, employed in the fine constitutional undertaking of determining cases of "alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *Id.* at 285 (quoting *Speiser v. Randall*, 357 U.S. at 525).²⁹

In *New York Times*, this Court recognized that it could not rely on truth or falsity to establish the line of constitutional demarcation between protected and unprotected speech about public officials and political candidates because "erroneous statement" is inevitable in political debate and must be protected if "freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" 376 U.S. at 271-72 (citation omitted). A rule compelling critics of political candidates to "guarantee the truth of all [their] factual assertions" would

²⁹ This Court has performed such constitutional line-drawing between protected and unprotected speech in a variety of First Amendment settings. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153 (1974) (obscenity); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (same); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (fighting words); *Pennkamp v. Florida*, 328 U.S. 331 (1946) (contempt); *Fiske v. Kansas*, 274 U.S. 380 (1927) (allegedly subversive expression).

lead to "self-censorship" and would force such critics to "make only statements which 'steer far wider of the unlawful zone.'" *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526).

To avoid such a constitutionally impermissible outcome, this Court determined that *calculated* falsehood must mark the outer boundary between protected and unprotected expression about political candidates. See *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. As the Court explained in *Garrison v. Louisiana*, 379 U.S. at 75, "[a]lthough honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity." Moreover, permitting this narrow category of expression to be sanctioned does not offend constitutional principles because the calculated falsehood "place[s] the publisher 'at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.'" *Curtis Publishing Co. v. Butts*, 388 U.S. at 153 (plurality opinion) (quoting *Garrison v. Louisiana*, 379 U.S. at 75).³⁰ "Actual malice," therefore, is designed to exclude from the scope of constitutional protection only those statements about political candidates "made with [a] high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

³⁰ "Calculated falsehood falls into that class of utterances which . . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Garrison v. Louisiana*, 379 U.S. at 75 (citation omitted); cf. *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) ("constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function") (emphasis in original).

C. The Court of Appeals Erroneously Denied Constitutional Protection to the Expression at Issue on the Ground that the *Journal News* Allegedly Engaged in "Highly Unreasonable Conduct."

The "actual malice" standard affords constitutional protection to all expression about political candidates, except that narrow category of speech published despite a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74. Stated differently, "[t]here must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of [its] publication." *St. Amant v. Thompson*, 390 U.S. at 731 (emphasis added). In short, "the publisher must come close to wilfully blinding itself to the falsity of its utterance." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 782 (1986) (Stevens, J., dissenting).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), a plurality of the Court advocated a different formula for use only in cases involving public figures, *not* public officials or candidates for public office such as Connaughton. The standard proposed by the *Butts* plurality would disregard the defendant's intent to disseminate falsehood and would instead require only a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" in suits instituted by public figures. *Id.* at 155 (plurality opinion of Harlan, J.).³¹ This journalistic malpractice standard was, however, expressly *rejected* by the majority in *Butts*, which instead applied the "actual malice" standard of *New York Times* to suits instituted

³¹ In *Butts*, the plurality expressly found that "none of the particular considerations involved in *New York Times* is present" in a case that does not involve criticism of public officials or political candidates and thus deemed it appropriate to hold "public figures" to a less rigorous standard. 388 U.S. at 154.

by public figures as well as public officials.³² In *Gertz v. Robert Welch, Inc.*, 418 U.S. at 335-36, the Court reaffirmed the *Butts* majority's extension of the "actual malice" standard to actions involving all public figures.

In this case, although the Court of Appeals correctly stated the "actual malice" standard as set forth in *New York Times* at the outset of its inquiry, see App. 5a-6a, it proceeded to equate "actual malice" with the journalistic malpractice standard proposed by the *Butts* plurality, see App. 38a. This fundamental error infected the Court of Appeals' entire analysis and rendered its decision constitutionally infirm.³³ The Court of Appeals acknowledged as much in setting forth its ultimate assessment of the "actual malice" issue:

[T]his court concludes that the *Journal's* decision to rely on Thompson's highly questionable and condemning allegations without first verifying those accusations through her sister, Stevens [sic], and without independent supporting evidence constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers which demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of "actual malice" as found by the jury.

App. 43a.³⁴

³² The majority of the Court that extended the "actual malice" standard to actions brought by public figures included Chief Justice Warren, who concurred in the results reached by the plurality but expressly did so by application of the "actual malice" standard, 388 U.S. at 162 (Warren, C. J., concurring in judgment), Justices Black and Douglas, *id.* at 170 (Black, J., concurring in part), and Justices Brennan and White, *id.* at 172-73 (Brennan, J., concurring in part); see Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267, 275.

³³ Indeed, the Court of Appeals referenced the journalistic malpractice standard no less than five times in the course of its opinion. See App. 17a n.4, 38a, 40a, 41a, 43a.

³⁴ This Court has repeatedly emphasized that "actual malice" is not a malpractice standard that measures journalistic conduct

From *New York Times* to *Hustler Magazine v. Falwell*, the decisions of this Court over the past quarter-century make plain that, to strip expression about public persons, especially public officials and political candidates, of the protections guaranteed by the First Amendment, there must be clear and convincing evidence of speech uttered with a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74. The Court of Appeals' erroneous application of a standard of liability that permits expression at the core of the First Amendment to be penalized upon a finding that the *Journal News* engaged in an "extreme departure" from journalistic standards cannot constitutionally stand.

II. THE JURY'S FINDING THAT THE EXPRESSION AT ISSUE IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION CANNOT SURVIVE APPELLATE REVIEW OF THE TRIAL RECORD.

The Court of Appeals' failure to apply the "actual malice" standard in this case represents only half of its rejection of this Court's decision in *New York Times Co. v. Sullivan*. Equally central to *New York Times* is its articulation of the procedural safeguards necessary to give effect to the substantive doctrine first announced in that case. Since *New York Times*, a jury finding that criticism of public officials or political candidates is beyond the scope of constitutional protection must also be

against the benchmark of a hypothetical reasonable publisher. Cf., e.g., *Rosenblatt v. Baer*, 383 U.S. at 83-84 ("negligent misstatement" is constitutionally insufficient to defeat *New York Times* privilege); *Garrison v. Louisiana*, 379 U.S. at 79 ("defeasance of the [*New York Times*] privilege is conditioned, not on mere negligence, but on reckless disregard for the truth"); see *Woods v. Evansville Press Co.*, 791 F.2d 480, 489 (7th Cir. 1986) ("[J]ournalism skills are not on trial in this case. The central issue is not whether the [challenged] column measured up to the highest standards of reporting or even to a reasonable reporting standard, but whether the defendants published the column with actual malice—actually knowing it to be false or having serious doubts as to its truth.").

supported by *clear and convincing* evidence of "actual malice," and appellate courts, including this Court, "must 'make an independent examination of the whole record'" to make certain that "the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285-86 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). Taken together, the "actual malice" standard, the evidence of convincing clarity necessary to satisfy it, and the independent review of the trial record required to sustain it, ensure that liability for defamation will not impermissibly penalize expression protected by the First Amendment.

In the instant case, however, the Court of Appeals not only misconstrued the "actual malice" standard itself, it effectively discarded the constitutional requirement of proof by clear and convincing evidence and declined to undertake the independent, *de novo* review of the jury's finding of "actual malice" required by *New York Times*. Had it properly invoked the searching, independent review of the record and exacting burden of proof envisioned by *New York Times*, the Court of Appeals could not have affirmed the jury's verdict in favor of Connaughton.

A. The Court of Appeals Misconstrued the Meaning and Purpose of Independent Review.

The Court of Appeals' analysis bespeaks a fundamental misconception of its constitutional obligation to examine independently "the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *New York Times Co. v. Sullivan*, 376 U.S. at 285 (quoting *Pennkamp v. Florida*, 328 U.S. at 335). Appellate courts are charged with a nondelegable duty, grounded in the First Amendment itself, to undertake an "independent examination of the whole record," 376 U.S. at 285 (citation omitted), to ensure that protected expression is not penalized. This constitutional obligation, which has its most urgent appli-

cation in the context of a jury verdict penalizing criticism of a candidate for public office, is rendered ineffective and essentially meaningless by the Court of Appeals' formulation.

1. Appellate courts have a constitutional obligation to undertake a searching review of the whole record to ensure that protected expression is not penalized.

The judiciary's constitutional obligation to determine whether expression is unworthy of First Amendment protection is at the center of *New York Times*, and was emphatically reaffirmed by this Court in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Under the "actual malice" determination, where the issue for decision is whether particular expression is protected by the First Amendment, "it [is] necessary, in order to pass upon the Federal question, to analyze the facts." *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26 (quoting *Fiske v. Kansas*, 274 U.S. at 385-86). Although this inquiry may turn on "largely factual questions," *Bose Corp. v. Consumers Union*, 466 U.S. at 501 n.17, it "involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind," *id.* at 506 n.25 (quoting *Roth v. United States*, 354 U.S. at 498) (emphasis in original).

The independent review contemplated by *New York Times* and *Bose* is "*de novo* review." *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. As this Court explained in *Bose*, "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511. In such cases, "[j]udges, as expositors of the Constitution, must *independently* decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* (emphasis added).

This Court's analysis in *New York Times* proceeds from the premise that the "actual malice" concept, standing alone, does not "eliminate the danger that decisions by triers of fact may inhibit" lawful expression. *Bose Corp. v. Consumers Union*, 466 U.S. at 505. The procedural safeguard of independent review is inextricably bound up with the "actual malice" standard and gives effect to the substantive protections afforded by the First Amendment. Cf. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958) (application of state procedural rules in federal court).³⁵ Simply put, the "stakes" involved in the "actual malice" determination are "too great to entrust them finally to the judgment of the trier of fact." *Bose Corp. v. Consumers Union*, 466 U.S. at 501 n.17.³⁶

2. The constitutional obligation of independent review is of greatest importance in the context of a jury verdict penalizing expression.

The rule of independent review applies with special force to jury verdicts. There is a palpable danger that juries will not "give adequate attention to limits imposed by the First Amendment." *Ollman v. Evans*, 750 F.2d at

³⁵ As this Court recognized in *Speiser v. Randall*, the "procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied" in First Amendment cases. 357 U.S. at 520 (emphasis added).

³⁶ Cf. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 175 & n.13 (1983) (suggesting that, under *New York Times*, reviewing court may "'re-examine, as a court of first instance, findings of fact supported by substantial evidence'" (quoting *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537-38 (1951))). In *Bose*, this Court explained that the *de novo* review contemplated by *New York Times* does not extend beyond the evidence relevant to the issue of "actual malice." 466 U.S. at 514 n.31. Thus, a reviewing court may "engage[] in an independent assessment only of the evidence germane to the actual-malice determination"; otherwise, "the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact." *Id.*

1006 (Bork, J., concurring). Moreover, a jury's fact-finding process "is much less evident to the naked eye and thus more suspect" than that of a trial judge. *Bose Corp. v. Consumers Union*, 466 U.S. at 518 n.2 (Rehnquist, J., dissenting).

At bottom, the First Amendment reflects a skepticism of the will of the majority that the institution of the civil jury seeks to work. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (purpose of Bill of Rights is to place certain subjects beyond the reach of popular majorities).³⁷ There is a great danger that a jury will misunderstand, or misapply, the applicable constitutional principles, find for the plaintiff out of sympathy, or find against the defendant out of hostility to expression that ought to be protected.³⁸

³⁷ Both *New York Times* and *Bose* recognize that the Seventh Amendment's "ban on re-examination of facts does not preclude [a reviewing court] . . . from determining whether governing rules of federal law have been properly applied to the facts." *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26; see *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. Indeed, because the "actual malice" standard is a creature of constitutional law, it is not persuasive to suggest that the Seventh Amendment, which merely preserves the right to a jury trial as it existed at common law, speaks to how that issue ought to be resolved. See *Galloway v. United States*, 319 U.S. 372, 390 (1943). There is simply no helpful analogue in the common law of torts to a constitutional concept such as "actual malice." Moreover, even if the common law had committed the resolution of actual malice-like issues to the jury, *New York Times* itself establishes that a principal function of the First Amendment was to remove such a powerful weapon from the majority will that the jury is designed to reflect. See 376 U.S. at 269.

³⁸ See *Time, Inc. v. Hill*, 385 U.S. at 406 (Harlan, J., dissenting in part) ("[a]ny nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding"); *Tavoulareas v. Piro*, 817 F.2d 762, 809 (D.C. Cir.) (Ginzburg, J., concurring), cert. denied, 108 S. Ct. 200 (1987) ("*New York Times* . . . presents a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be

In the instant case, the jury's \$195,000 award of punitive damages, especially when coupled with its effective failure to award *any* compensatory damages,³⁹ speaks eloquently to the need for independent review to prevent juries from punishing expression or speakers with which they disagree. As this Court recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349, the otherwise "uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." The punitive damages awarded here are in no sense "compensation for injury. Instead, they are private fines levied by" a civil jury to punish what is perceived as "reprehensible conduct." *Id.* at 350. It is precisely the function of independent review to ensure that the jury's notion of "reprehensible conduct" accords with the commands of the First Amendment.

3. The Court of Appeals' analysis renders the obligation of independent review a nullity.

The Court of Appeals held that the obligation of independent review attaches only to the "ultimate conclusion of clear and convincing proof of actual malice," and not to "preliminary, operative or subsidiary factual determinations," which are governed instead by a "clearly erroneous" standard of review. App. 33a. In conducting its "clearly erroneous" review, the Court of Appeals consciously disregarded *all* record evidence negating a finding of "actual malice," including evidence that did not implicate determinations of credibility by the trier of fact. App. 19a. Instead, the Court of Appeals embarked on a quest for any evidence that could conceivably support the jury's verdict and intentionally drew all possible

false"); Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 527 (1970) ("any expansive conception of the jury's role" in First Amendment cases "is inconsistent with a vigorous application" of freedom of expression).

³⁹ See pp. 12-13 *supra*.

adverse inferences from the record to support that verdict. App. 35a-36a.

Based upon this construction of its obligation of independent review, the Court of Appeals inferred eleven "preliminary" or "subsidiary" findings of "fact" that the jury "could have" made, but undertook no independent assessment of these inferences or of the plausibility of the inferred findings themselves. App. 35a-36a (emphasis added). The Court of Appeals denominated its eleven subsidiary findings as "credibility" assessments that "could have" been made by the jury and concluded that these "facts" are exempt from appellate review, except under a "clearly erroneous" standard. Finally, the Court of Appeals undertook to perform an "independent review" of these eleven "subsidiary" findings, but only to determine whether, when taken together, they supported the jury's "ultimate" finding of "actual malice." App. 37a.

Thus, the Court of Appeals' notion of independent review requires an appellate court to ignore even undisputed evidence supporting the defendant, to draw all inferences from the facts adduced at trial—no matter how unfounded or speculative—in favor of the plaintiff, to "cumulate" all conceivable inferences in support of the verdict, and only then to consider whether, on that manufactured "record," "actual malice" has been demonstrated with convincing clarity. So construed, the obligation of independent review becomes a nullity and permits, as in the instant case, a jury to penalize constitutionally protected expression.

In *Bose*, this Court held that "the clearly-erroneous standard . . . does *not* prescribe the standard of review to be applied . . . in a case governed by *New York Times v. Sullivan*." 466 U.S. at 514 (emphasis added). The independent review contemplated by *New York Times* and *Bose* is "*de novo* review." *Id.* at 508 n.27. It is not satisfied by considering the evidence in the light most favorable to the plaintiff. Under the Court of Appeals'

formulation, not even its "ultimate conclusion" of "actual malice" is truly independent. It is, in fact, wholly dependent on the "subsidiary" findings that the jury "could have" made, findings that are effectively immune from meaningful appellate review. The difference between the "clearly erroneous" standard of review, which accords a presumption of correctness to the jury's verdict, and the constitutional rule of independent review is, therefore, "much more than a mere matter of degree." *Id.* at 501.

The Court of Appeals' analysis assumes the existence of a bright and unwavering line that separates "subsidiary" or "preliminary" facts, on the one hand, and "ultimate" or "constitutional" facts, on the other. This Court, however, has long recognized that an "issue of fact is a coat of many colors." *Watts v. Indiana*, 338 U.S. 49, 51 (1949) (Frankfurter, J.); see *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (discussing "the vexing nature of the distinction between questions of fact and questions of law"). In *Bose*, this Court explained that,

[a]t some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue.

466 U.S. at 501 n.17.⁴⁰

⁴⁰ See J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) (emphasis in original):

In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive kinds of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of facts, and matters of fact reach upward, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court

The rule of independent review calls on appellate courts to make "broadly social judgments—judgments lying close to opinions regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (Frankfurter, J.). It thus involves "the very basis on which judgment of fallible evidence is to be made" and "clearly implies the application of standards of law." *Id.* As a result, "the duty of exercising a judgment" inherent in the concept of independent review cannot "be evaded by the illusory definiteness of any formula." *Id.* at 676.

The Court of Appeals' "emphasis on some great divide," *Tavoulareas v. Piro*, 759 F.2d at 149 (Wright, J., dissenting in part), separating "subsidiary" and "ultimate" facts distorts the process of judgment that the rule of independent review presupposes. To ensure that independent review fulfills its constitutionally required function, therefore, an appellate court must (a) review the whole record, including uncontradicted evidence supporting the defendant, and draw its own inferences from the record evidence, and (b) assess independently in each case the significance, if any, of those categories of circumstantial proof that are, at best, of tenuous probative value in establishing "actual malice."

- a. An appellate court must review the whole record and draw its own inferences from the evidence.

Independent review requires an appellate court to make an "examination of the whole record," *New York Times Co. v. Sullivan*, 376 U.S. at 285 (emphasis added) (citation omitted), including undisputed evidence that negates an inference of "actual malice." "By its repeated emphasis that a *New York Times* review includes the whole record on actual malice, the high court has made it un-

chooses to draw the line between public interest and private right.

mistakably clear that it is constitutionally inadequate to review only those portions of the record that support the verdict." *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 845, 727 P.2d 711, 718, 231 Cal. Rptr. 518, 525 (1986), *cert. denied*, 107 S. Ct. 1983 (1987) (emphasis in original).⁴¹

Moreover, to require a reviewing court to draw the inferences from each fact in the record most adverse to the defendant, while ignoring more reasonable inferences, necessarily skews the fact-finding process and undermines the requirement that the plaintiff prove "actual malice" with convincing clarity. Clear and convincing evidence will always be found when, in reviewing the trial record, an appellate court is obligated to adopt those factual inferences most adverse to the defendant.⁴²

Indeed, the very process of reviewing the record to determine whether the defendant published the expression at issue with "actual malice" is a matter of drawing inferences from the evidence. By limiting its review to a pool of "subsidiary" findings the jury "could have" made, the Court of Appeals has injected a new step in the process of independent review that renders it meaningless. The "exercise in ritualistic inference granting," *Tavoulareas v. Piro*, 759 F.2d at 147 (Wright, J., dissenting in part), that is necessary to fill the pool of "subsidiary" facts effectively eliminates the process of judgment and pre-determines the result. See *Garrison v. Louisiana*, 379 U.S. at 81 (Douglas, J., concurring) ("If malice is all

⁴¹ See *St. Amant v. Thompson*, 390 U.S. at 733 ("[o]ther facts in this record support our view" that jury finding of "actual malice" must be reversed).

⁴² While the "preponderance of the evidence" standard "allows both parties to 'share the risk of error in roughly equal fashion,'" the clear and convincing evidence standard "expresses a preference for one side's interests." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). Thus, the clear and convincing evidence requirement "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

that is needed, inferences from facts as found by the jury will easily oblige.")⁴³

The Court of Appeals' repeated invocation of "credibility" determinations that the jury could have made is simply beside the point in this context. App. 2a. An independent review of the whole record, including *undisputed* evidence favoring the defendant, does not intrude upon the reviewing court's ability to resolve *disputed* issues of material fact in favor of the jury's verdict. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 398 (1948). Further, "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion," *Bose Corp. v. Consumers Union*, 466 U.S. at 512, and a reviewing court is therefore not permitted to "substitute speculation for proof," *Galloway v. United States*, 319 U.S. at 387.⁴⁴ Similarly, the inferences prop-

⁴³ See Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229 n.7 (1985) (when conducting independent review, "judge 'marshals' the adjudicative facts by culling them from the evidence presented and arranging them in a relevant sequence"). The Court of Appeals' determination that it is required to draw all inferences from the evidence against the defendant disregards the constitutional purpose of the "actual malice" rule itself—i.e., to ensure that only calculated falsehood is beyond the First Amendment's protections. See pp. 21-22 *supra*. When fundamental rights such as these are at stake, this Court has previously suggested that "the facts and the law should be construed as far as is reasonably possible in favor of" vindicating such rights. *Nishikawa v. Dulles*, 356 U.S. 129, 134-35 (1958) (quoting *Schneiderman v. United States*, 320 U.S. 118, 122 (1943)).

⁴⁴ In the instant case, the Court of Appeals not only disregarded otherwise uncontroverted evidence, it presumed that the jury determined that the opposite had been established. See App. 27a-28a. For example, the Court of Appeals purposefully declined to consider uncontradicted testimony that Blount personally confirmed Thompson's credibility with, *inter alia*, Butler County Prosecutor John Holcomb prior to publication. J.A. 47, 146-47. As a result, the Court of Appeals presumed the jury to have concluded that Blount had secured *no* such assurances of Thompson's credibility at all. See App. 20a ("Blount knew that he had not conducted *any* investigation of Thompson's credibility within the context of the Con-

erly to be drawn from the record are matters reserved for the exercise of the reviewing court's independent judgment and in no wise preclude the jury's presumed assessments of witness credibility from governing the resolution of contradictory evidence.⁴⁵

- b. *In each case, an appellate court must independently assess the significance, if any, of evidence of tenuous probative value.*

The version of appellate review adopted by the Court of Appeals impermissibly credits, as a byproduct of its process of "ritualistic inference granting," evidence that should properly have little or no probative value in adjudicating the issue of "actual malice." Specifically, the Court of Appeals looked to evidence that the *Journal News* (a) competes for circulation with another news-

naughton accusations.") (emphasis added). In so doing, the Court of Appeals took the additional step of determining, without any independent support in the record, that the "jury could have further concluded that the *Journal's* action after the Thompson October 27 interview was nothing more than a charade to cloak its true motive[]." App. 16a. Such "speculation run riot . . . cannot supply the place of proof." *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951).

⁴⁵ In *Bose*, this Court recognized that the clearly erroneous standard "commands that 'due regard' shall be given" to the trier-of-fact's "opportunity to observe the demeanor of witnesses." 466 U.S. at 499-500. Nevertheless, the Court concluded, "the constitutionally based rule of independent review permits this opportunity to be given its due." *Id.* The "due regard" concept does no more than reflect "the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Id.* at 500. Thus, when conducting the independent review mandated by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility. It is not, however, bound by such presumed determinations if, in the exercise of the reviewing court's independent judgment, it concludes that the record, considered as a whole, does not support the jury's conclusion that the expression at issue is unworthy of constitutional protection. Indeed, in *Bose* itself, this Court ultimately rejected the trial judge's determination that the testimony of the author of the article at issue was, in material respects, "not credible." *Id.* at 512.

paper; (b) editorially endorsed Connaughton's political opponent; and (c) failed to interview Alice Thompson's sister prior to publication. From that evidence, the Court of Appeals inferred a motive to harm Connaughton through critical publications as well as a plan to do so in the absence of thorough investigation, and concluded that these inferences, when cumulated, constitute clear and convincing evidence of "actual malice." App. 41a.

According to this peculiar logic, "actual malice" must be presumed in virtually *any* defamation action instituted by a political candidate against a newspaper. "[A]ll newspapers seek to increase their market share by publishing newsworthy stories," App. 64a (Guy, J., dissenting), and most newspapers endorse and/or comment upon the qualifications of political candidates. Under the Court of Appeals' view, therefore, a newspaper such as the *Journal News* starts out with two strikes against it. Nothing could be more contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. at 270.⁴⁶

The probative value of such evidence, if any, is certainly slight. Yet, because it invites juries to focus on a newspaper's editorial endorsement and competitive posture, its prejudicial impact is potentially enormous. See *Hustler Magazine v. Falwell*, 108 S. Ct. at 880 ("in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment"). The Court of Appeals' analysis effectively *requires* an inference of "actual malice"

⁴⁶ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (competition furthers First Amendment by ensuring "the widest possible dissemination of information from diverse and antagonistic sources"); *Woods v. Evansville Press Co.*, 791 F.2d at 484 ("It would stifle the discussion of matters of public importance if the plaintiff could strip the defendants of their qualified privilege merely by showing that the challenged article was published, at least in part, with the hope of increased sales.").

from evidence that a newspaper may have had a motive to criticize the plaintiff or to increase its sales.⁴⁷

Similarly, the Court of Appeals' analysis mandates an inference of actual malice, not from evidence that the defendant failed to investigate before publishing, but that the defendant's investigation was not as extensive as the jury may have preferred. App. 42a-43a. This Court has held, on numerous occasions, that "mere proof of failure to investigate, without more, cannot establish [a publisher's] reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 332; accord *St. Amant v. Thompson*, 390 U.S. at 731. In contrast to this well-established constitutional law, however, the Court of Appeals assumed that it had no choice but to infer "actual malice" from the *Journal News*' failure to interview Patsy Stephens, despite the undisputed fact that the newspaper *did* interview at least seven sources prior to publication, including Connaughton himself.

The question before the Court in this case is not, however, the abstract relevance of specific categories of evidence to the "actual malice" determination. Rather, it is whether the Court of Appeals' decision *requiring* a reviewing court to draw an inference of "actual malice" from such evidence is consistent with the constitutional obligation of independent review. Because such evidence is, at best, only tenuously probative of a motive to falsify,

⁴⁷ Because of the risk that such evidence can, as a practical matter, serve as an effective, but nonetheless improper, substitute for proof that the defendant "in fact entertained serious doubts" about the truth of its publication, *St. Amant v. Thompson*, 390 U.S. at 731, this Court has repeatedly emphasized that, while "a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment *prohibits* such a result in the area of public debate about public figures." *Hustler Magazine v. Falwell*, 108 S. Ct. at 881 (emphasis added). Indeed, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." *Garrison v. Louisiana*, 379 U.S. at 74 (quoting Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 n.90 (1949)).

see *Henry v. Collins*, 380 U.S. at 357, a reviewing court must draw its own inferences based upon the record as a whole, and not assume an inference that, at least standing alone, cannot constitute "actual malice" as a matter of law.

4. The Court of Appeals' analysis conflicts with the rule of independent review traditionally applied by this Court in First Amendment cases.

The scope of independent review articulated by the Court of Appeals does not comport with this Court's performance of this constitutional obligation in other defamation actions instituted by public persons. Indeed, if this Court *had* applied the Court of Appeals' version of independent review in other cases, much expression heretofore thought to be protected by the First Amendment would become the subject of civil sanctions.

In *New York Times* itself, for example, the plaintiff had submitted evidence that no employee of the newspaper "made an effort to confirm the accuracy of the advertisement" at issue in that case, "either by checking it against recent *Times* news stories relating to some of the described events," which would have disclosed the falsity of some of its statements, "or by any other means." 376 U.S. at 261. In addition, the *Times* failed to publish the retraction demanded by the plaintiff, but subsequently retracted the same advertisement upon the demand of the Governor of Alabama, even though "the matter contained in the advertisement was equally false as to both parties." *Id.* at 263. Presumably, the *Times* was also aware that the signatories of the advertisement, including prominent civil rights activists, had a motive to criticize and thereby harm the plaintiff and other active opponents of racial equality. See *id.* at 256-57. Indeed, the *Times* itself had repeatedly editorialized in favor of desegregation and civil rights legislation and the newspaper competed for readership, both in Alabama and nationally, with other media. Under the Court of Appeals' analysis, all of this evidence, especially when

cumulated, would have supported a chain of inferences leading to the conclusion that the *Times* had published the advertisement with "actual malice."⁴⁸

Similarly, in *St. Amant v. Thompson*, the record contained evidence that St. Amant, himself a candidate for public office, accused Thompson of participating in a scheme to "secret[e] union records," 390 U.S. at 728, even though he had no "personal knowledge" of Thompson's activities, *id.* at 730. Moreover, St. Amant relied *solely* upon the word of one Albin and failed to "verify the information with those in the union office who might have known the facts." *Id.* St. Amant had no knowledge of Albin's "reputation for veracity," but presumably was aware that Albin "was engaged in an internal struggle within the union" and thereby had ample motivation to disseminate false information. *Id.* at 730, 733.⁴⁹ Had this Court embraced the standard of appellate review set out by the Court of Appeals, this record evidence, and the negative inferences that could be drawn therefrom, surely would have supported the jury's verdict for Thompson. Indeed, that conclusion would have followed inexorably if, as the Court of Appeals would *require*, this Court had discarded the testimony of St. Amant that, *inter alia*, "he verified other aspects of Albin's information." *Id.* at 733.⁵⁰

⁴⁸ Moreover, in reviewing the jury's verdict under the Court of Appeals' formulation, this Court would have been required to ignore all contrary evidence in the record, even if undisputed, including the testimony of the *Times*' employees, which was expressly relied upon by this Court, that they did not know that the advertisement contained false statements. See 376 U.S. at 261, 286-87.

⁴⁹ There was apparently also evidence in the record which indicated that St. Amant "gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences." *St. Amant v. Thompson*, 390 U.S. at 730.

⁵⁰ The Court of Appeals' rendition of the rule of independent review is similarly alien to other corners of First Amendment juris-

B. An Independent Review of the Whole Record Demands that the Judgment Below Be Reversed.

The detailed rendition of the undisputed facts in the trial record, along with those disputed issues of material fact resolved in favor of Connaughton, which is set forth in the *Statement of the Case*, see pp. 1-12 *supra*, forms the record upon which this Court must necessarily perform its *de novo* review. The eleven "subsidiary findings" inferred by the Court of Appeals are, as demonstrated below, wholly irrelevant to a proper independent review of this record. Indeed, an independent review of the record in this case, one that is faithful to this Court's pronouncements in *New York Times* and *Bose*, compels the conclusion that the expression at issue is protected by the First Amendment.

1. The Court of Appeals' eleven subsidiary findings cannot survive an independent review of the whole record.

The Court of Appeals' standard of review required it to ignore all undisputed evidence introduced by the *Journal News* in favor of an assortment of "findings" that the jury "could have" made. App. 35a-36a. Yet, as Judge Guy observed in his dissent, "[e]ven if these speculative 'subsidiary' factual findings were the only evidence before

prudence. See *Pennekamp v. Florida*, 328 U.S. at 345 (in assessing whether expression posed "clear and present danger" to the administration of justice, this Court acknowledged that "the ultimate power is here to ransack the record for facts," although it will more typically review only the undisputed findings below). In *Cox v. Louisiana*, 379 U.S. 536, 545 n.8 (1965), for example, this Court undertook a searching, *de novo* review of the trial record and reversed, in the name of the First Amendment, the convictions of the leader of a civil rights demonstration on charges of, *inter alia*, disturbing the peace and picketing before a courthouse. In so doing, the Court reviewed the *whole* record, declined to credit some of the State's witnesses, see *id.* at 548 n.12, and credited a film of the events at issue which, the Court concluded, "reveals that the students, though they undoubtedly cheered and clapped, were well behaved throughout," *id.* at 547.

this court," they could not "constitute 'clear and convincing evidence' of a reckless disregard for the truth." App. 63a.

First, the Court of Appeals presumed that the jury *could have found*

that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the *Journal* Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolan [sic] from the *Journal* as compared with the equally consistently unfavorable news coverage afforded Connaughton.

App. 35a. There is no record evidence of any "confidential personal relationship" between Judge Dolan and Blount; to the contrary, Blount testified, without contradiction, that he was not a personal friend of Judge Dolan, a statement corroborated by Judge Dolan during the damages phase of the trial. R. 582, 1150-51. The record contains *no* evidence of "consistently unfavorable" coverage of Connaughton. Instead, the record reveals that Connaughton praised the *Journal News* for its previous reporting about him. J.A. 322. Finally, there is *no* record evidence concerning prior, "favorable" *Journal News* coverage of Judge Dolan.⁵¹

Second, the Court of Appeals presumed that the jury *could have concluded* "that the *Journal* was engaged in a

⁵¹ During the damages phase of the trial, the *Journal News* submitted uncontroverted evidence that Judge Dolan had been the subject of extensive critical coverage in the newspaper, arising from his decision to give a suspended, six-month jail sentence to the intoxicated driver of a car that struck and killed a six-year-old girl, and from the corruption allegations against Ney. R. 1081-82, 1145-49.

bitter rivalry with the *Cincinnati Enquirer* for domination of the greater Hamilton circulation market as evidenced by Blount's vituperous public statements and criticism of the *Enquirer*." App. 35a. However, the *only* evidence marshalled by the Court of Appeals in support of this "finding" is references to the *Enquirer* in Blount's October 27 column. J.A. 207-11.⁵²

Third, the Court of Appeals presumed that the jury *could have found* "that the *Enquirer's* initial expose of the questionable operation of the Dolan court was a high profile news attraction of great public interest and notoriety that had 'scooped' the *Journal* and by Blount's own admission was the most significant story impacting the Connaughton-Dolan campaign." App. 35a. In fact, Blount testified that earlier coverage in *both* newspapers of the resignation of New, rather than the *Enquirer's* subsequent "expose" on Judge Dolan, "was probably the most startling story in this whole campaign." J.A. 21.

Fourth, the Court of Appeals presumed that the jury *could have concluded* that "by discrediting Connaughton the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area." App. 35a. Yet, there is no record evidence that the publication of the article at issue was either intended to undermine, or in fact did undermine, the *Enquirer's* market share in the Hamilton area.

Fifth, the Court of Appeals presumed that the jury *could have found* "that Thompson's emotional instability coupled with her obviously vindictive and antagonistic attitudes toward Connaughton as displayed during an

⁵² The only other testimony in the record that speaks to "competition" between the newspapers is Blount's innocuous observation that "[w]e like to get a story ahead of them, but it's like the Bengals and the Steelers. Sometimes the Steelers are going to win, and sometimes the Bengals are going to win." J.A. 22.

interview on October 27, 1983, arranged by Billy New's defense attorney, afforded the *Journal* an ideal vehicle to accomplish its objectives." App. 35a-36a. There is no evidence that Thompson "demonstrated," much less that Blount or Long observed, any "emotional instability" at the October 27 interview.⁵³ While Thompson did express her frustration that Connaughton had disclosed her identity to the police, there is no probative evidence that she displayed such an "antagonistic" or "vindictive" attitude that would lead her to falsify information about Connaughton. See *St. Amant v. Thompson*, 390 U.S. at 733 (reliance on source locked in fierce union struggle with allies of plaintiff did not permit inference of "actual malice").

Sixth, the Court of Appeals presumed that the jury *could have found* "that the *Journal* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition." App. 36a. However, while Connaughton had told Blount during their interview, without any corroboration, that Connaughton *believed* Thompson had once been a patient at a psychiatric hospital, there is no evidence in this record that the *Journal News* had any reason to conclude, based solely on Connaughton's bald assertion, that Thompson had received "treatment" for a "mental condition." Moreover, although Thompson had been convicted in Judge Dolan's court on charges of shoplifting and misdemeanor assault, it is undisputed that the prosecutor in the New case told the *Journal News* prior to publication that Thompson was credible, J.A. 47, 146-47, and that Connaughton found her sufficiently believable to base his own private criminal complaint on the statements of Thompson and her sister, J.A. 239-41.

Seventh, the Court of Appeals presumed that the jury *could have concluded* "that every witness interviewed by

⁵³ See note 8 *supra*.

Journal reporters discredited Thompson's accusations." App. 36a. This presumed "finding" ignores Connaughton's own confirmation, corroborated in significant part by his wife, of the substance of Thompson's allegations. J.A. 98, 115-16, 255-77.

Eighth, the Court of Appeals presumed that the jury *could have found* "that the *Journal* intentionally avoided interviewing Stephens between October 27, 1983, the date of its initial meeting with Thompson, and November 1, 1983 when it printed its first story even though it knew that Stephens could either credit or discredit Thompson's statements." App. 36a. Although the jury may have disbelieved the testimony of Blount and Long that Connaughton had agreed to arrange to have Stephens contact the newspaper, the record contains no evidence that the *Journal News'* failure to interview Stephens was *intentional*. Most importantly, however, Connaughton's own admissions of the substance of Thompson's statements made it unnecessary to secure *further* confirmation from Stephens. J.A. 35, 57; R. 608, 611.

Ninth, the Court of Appeals concluded that the jury *could have found* "that the *Journal* knew that publication of Thompson's allegations charging Connaughton with unethical conduct and criminal extortion and her other equally damaging statements would completely discredit and irreparably damage Connaughton personally, professionally and politically." App. 36a. Even if the trial record contained any affirmative evidence of such knowledge, which it does not, such "an intent merely to inflict harm," which by definition may be present in any publication found by a jury to be defamatory, is at best tenuously probative of an "intent to inflict harm through falsehood," the touchstone of a proper finding of "actual malice." *Garrison v. Louisiana*, 379 U.S. at 73. In addition, the article nowhere accuses Connaughton of "unethical conduct and criminal extortion," App. 36a; at most, as Connaughton's Complaint itself alleges, the ar-

ticle "imputes unethical behavior to the plaintiff as a lawyer and portrays the plaintiff, both expressly and by innuendo, as a person unfit for public office," J.A. 16, ¶ 17 (emphasis added).

Tenth, the Court of Appeals presumed that the jury could have found that the *Journal News*' "prepublication legal review was a sham." App. 36a. Yet, the undisputed evidence is that attorney Irwin carefully examined the article, questioned the newspaper's staff, and concluded, based on Connaughton's confirmation of the substance of Thompson's allegations and the statements of the prosecutor that Thompson was a credible witness, that it was appropriate to publish. R. 796-97, 799-800.⁵⁴ It is one thing to presume that the jury rejected Irwin's review as affirmative evidence in support of the *Journal News*; it is quite another to infer from that rejection that the review was a "sham," or that such a "finding" is itself evidence of "actual malice."

Eleventh, the Court of Appeals presumed that the jury could have concluded "that the *Journal* timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*." App. 36a. The record contains no evidence to support such a "finding." To the contrary, the uncontradicted record establishes that the timing of the article's publication was based upon longstanding *Journal News* guidelines prohibiting the dissemination of new allegations against a candidate within a week of the election. J.A. 41; R. 617.

⁵⁴ See *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984) (evidence that defendant submitted book to "experienced libel attorney" before publication negates inference of "actual malice").

2. The expression at issue is protected by the First Amendment.

Had the Court of Appeals properly exercised its constitutional obligation to conduct an independent review of the entire record in this case, it would have been compelled to conclude, as did Judge Guy in dissent, that "the plaintiff could not have made the requisite showing of actual malice at trial under any standard of proof, let alone the rigorous 'clear and convincing evidence' standard which applies in this case." App. 50a (Guy, J., dissenting).⁵⁵

An independent review of the jury's finding of "actual malice" requires reference to only one piece of evidence, the undisputed text of the *Journal News*' prepublication interview with Connaughton. Cf. *Cox v. Louisiana*, 379 U.S. at 547 (this Court based its independent review on film of demonstration). In that interview, Connaughton "confirmed the factual basis of Ms. Thompson's allegations," App. 58a (Guy, J., dissenting), and thereby "provided ample basis for the *Journal News* to conclude that Ms. Thompson's allegations were substantially true,"

⁵⁵ The record in this case fails to support the jury's verdict even under the "clearly erroneous" review allegedly conducted by the Court of Appeals. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. at 395 (emphasis added); see, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (court must look at record "viewed in its entirety"); 1 S. CHILDRESS & M. DAVIS, STANDARDS OF REVIEW 41 (1984) ("*Gypsum* made clear that its phrase puts the entire evidence to the test"). Thompson's credibility, as well as any question of the *Journal News*' failure to interview Stephens, were stripped of legal significance once Connaughton admitted, in a tape-recorded interview, the substance of Thompson's statements. Thus, when the "entire evidence" is viewed as a whole, one is left "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. at 395.

App. 60a. An evaluation of this evidence, as mandated by *New York Times* and *Bose*, requires no weighing of the credibility of conflicting witnesses or of the "reasonableness and probability" to be assigned to their testimony. App. 27a.⁵⁶

An independent review of the whole record in this case reveals that the *Journal News* was simply "performing its wholly legitimate function as a community newspaper" when it reported Thompson's statements—the latest in an ongoing exchange of allegations in a highly charged election campaign. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). The *Journal News*' article constituted a concededly accurate report of Thompson's accusations concerning Connaughton's fitness for the public office he sought. The article recited not only an accurate account of Thompson's description of the events at issue, but fully reported Connaughton's version of them as well. Such a balanced report in the context of a political campaign falls squarely within the protections of the First Amendment. As this Court recognized in *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. at 14, "[t]o permit the infliction of financial liability upon petitioners for publishing" accurately what both sides of a public dispute had to say "would subvert the

⁵⁶ In this regard, the Court of Appeals also ignored Connaughton's undisputed admission, at his press conference following publication of the article at issue, that Thompson's allegations were substantially accurate. See J.A. 245 ("There is no question but that the fact that certain words or key phrases have been mentioned—Maisonette, going south—but I do know these were never ever done in the form of an inducement.") (quoting Connaughton). Moreover, although Martha Connaughton confirmed material portions of Thompson's allegations, the Court of Appeals ignored Mrs. Connaughton's testimony altogether. J.A. 98, 116. Finally, the Court of Appeals failed to consider Connaughton's admission to the *Cincinnati Enquirer* that "there was some comment regarding the possibility that his wife might open a small ice cream shop or delicatessen in the building, and that possibly a job might be available there." J.A. 328.

most fundamental meaning of a free press, protected by the First and Fourteenth Amendments."

CONCLUSION

This Court has long recognized that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for [public] office." *Monitor Patriot Co. v. Roy*, 401 U.S. at 272. If the judgment in this case is permitted to stand, a daily newspaper will be compelled to pay a \$200,000 penalty, including \$195,000 in punitive damages, because it accurately reported to its readers a newsworthy controversy regarding a candidate for public office. This is precisely the sort of "[p]ublic discussion about the qualifications of a candidate for elective office" that presents the most compelling occasion for application of the principles of *New York Times Co. v. Sullivan*. *Ocala Star-Banner Co. v. Damron*, 401 U.S. at 300-01.

The Court of Appeals succeeded in reaching its result only by discarding this Court's mandate that "actual malice" be adjudicated under a subjective standard of the defendant's "awareness of [the] probable falsity" of its publication, *Garrison v. Louisiana*, 379 U.S. at 74, and its directive that appellate courts undertake an independent review of the entire record supporting a jury's finding of "actual malice," *Bose Corp. v. Consumers Union*, 466 U.S. at 511. Thus, in one regrettable stroke, the Court of Appeals succeeded in rejecting both the substantive and procedural underpinnings of *New York Times*.

The doctrine of independent review "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." 466 U.S. at 510-11. Absent such a review by this Court in this case, those liberties, though no less precious, will stand irreparably diminished. Accordingly, the *Journal News* respectfully requests that the judgment below be reversed and the case dismissed.

Respectfully submitted,

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Supreme Court, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit**

BRIEF OF RESPONDENT DANIEL CONNAUGHTON

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QUESTIONS PRESENTED FOR REVIEW

- (1) Does the record contain such overwhelming evidence of actual malice as to mandate an affirmance of the judgment by any standard of review?
- (2) Is the Sixth Circuit's judgment of affirmance based upon the type of independent *de novo* review required by *New York Times* and *Bose*?
- (3) Should the Court abandon the requirement of independent appellate review of public figure libel judgments or at least limit that review to the ultimate issue of fact — whether the record as a whole supports the jury's or trial court's finding that the plaintiff proved actual malice by clear and convincing evidence?
- (4) Does the requirement of independent appellate review established in *Bose* violate the Seventh Amendment?
- (5) If not, would construing *Bose* to mandate *de novo* review of each separate underlying factual issue, as Petitioner urges, violate the Seventh Amendment?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 842 F.2d 825 and is included in the Appendix to the Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment, United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Counterstatement of Facts

On November 1, 1983, the *Journal News*, a division of Harte-Hanks Communications, Inc., published a front-page article quoting a woman named Alice Thompson as stating that Daniel Connaughton, a candidate for Municipal Judge, promised her sister and her jobs and trips and other benefits "in appreciation" for their grand jury testimony that corrupt practices, including bribery, were occurring in the Hamilton Municipal Court, and that Connaughton told her that he intended to play a tape of their statements for incumbent Judge Dolan, his opponent, to force Dolan to resign. The article began by quoting Thompson as charging Connaughton with "dirty tricks" in promising her anonymity and not delivering it.

The statements attributed to Thompson, other statements appearing in the article, and the headline, were false and defamatory in that they were damaging to Connaughton's

professional reputation. The article may have caused him to be defeated for judge in the November 8, 1983 election.

The employees of the *Journal News* who designed the article and decided to publish it knew that the article was harmful to Connaughton. They also knew that it was false, because all of the persons asked by the *Journal News* whether Connaughton made the statements in question to Thompson told the *Journal News* that Connaughton made no such statements. They also knew that Thompson had been convicted of a crime of deception, had a history of psychiatric illness, and had an admitted motive to fabricate the statements she made to the *Journal News* about Connaughton.

The *Journal News* consciously avoided pursuing clearly available means of making absolutely certain that Thompson's statements were false. Yet, by the time of the prepublication conference when they made the final decision to publish the article, the *Journal News*' decisionmakers had formed the belief that Thompson's damaging accusations against Connaughton were based on Thompson's misinterpretations of what she had heard.

However, notwithstanding entertaining very serious doubts as to the truth of Thompson's statements, the *Journal News* nonetheless published them, because it was smarting from the *Cincinnati Enquirer*'s front page exposé of corruption in the Hamilton Municipal Court and was anxious to reestablish the *Journal News* as the dominant news force in Hamilton politics, and also because it wished to revive the sagging campaign of incumbent Judge Dolan, who had been badly wounded by the *Cincinnati Enquirer* and had come to the *Journal News* seeking aid and comfort. The *Journal News*' method of accomplishing those dual objectives was that of using Thompson's statements to turn the focus of Hamilton public opinion from the authentic issue of corruption in Judge Dolan's court to the spurious issue of whether Connaughton had employed unethical means to obtain grand jury testimony against Judge Dolan and his Director of Court Services, Billy Joe New.

Procedural History

The case was tried to a jury before Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, in a bifurcated proceeding. The liability trial resulted in three separate verdicts for the plaintiff, culminating in the verdict that the *Journal News* published a defamatory, false article about the plaintiff with actual malice.¹

Thereafter, the issue of damages was tried to the same jury, which awarded the plaintiff \$5,000.00 in compensatory damages and \$195,000.00 in punitive damages.

Prior to trial, Harte-Hanks moved for Summary Judgment, advancing *inter alia*, two legal defenses — that the *Journal News* was immune from liability because Thompson's statements were opinions rather than facts, and that the doctrine of neutral reportage gave the newspaper a privilege to publish the article in question. The District Court rejected both defenses in denying the motion.

Subsequent to the judgment, the defendant moved for judgment *n.o.v.* In denying that motion the District Court stated, "the Court is of the opinion that a properly impaneled jury, correctly instructed, awarded a verdict against the defendant that is appropriate from the evidence adduced." (J. App. at 8, Doc. No. 74).

The Sixth Circuit panel which heard the appeal devoted more than a year to conducting the painstaking, *de novo* review of the record mandated by this Court in *Bose Corp. v.*

¹ Number one, "Do you unanimously find by a preponderance of the evidence that the publication in question was defamatory toward the plaintiff?" "Yes."

Number two, "Do you unanimously find by a preponderance of evidence that the publication in question was false?" "Yes."

Number three, "Do you unanimously find by a clear and convincing proof that the publication in question was published with actual malice?" "Yes."

Consumers Union of U.S., Inc., 466 U.S. 485 (1984), "to ensure that the judgment does not pose a forbidden intrusion into First Amendment rights of free expression." *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 828 (6th Cir. 1988). A panel majority consisting of Judges Krupansky and Keith affirmed the judgment in an opinion by Judge Krupansky. Judge Guy dissented.

A Petition For Rehearing And Suggestion For Rehearing *En Banc* was duly denied.

The case is before this Court pursuant to a grant of *certiorari*.

SUMMARY OF ARGUMENT

Respondent hopes that *certiorari* was granted because this case so well illustrates the practical infeasibility of the independent appellate review component of the rule stated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and expanded in *Bose*, that the Court has chosen this case as the vehicle either to abandon that rule for the reasons expressed by Chief Justice Rehnquist in his dissent in *Bose* or at the very least to limit it to the ultimate fact as did the original panel in *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), *rev'd en banc*, 817 F.2d 762 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 200 (1987).

As is demonstrated herein, however, affirmance of the Sixth Circuit's judgment upholding Daniel Connaughton's verdict does not depend upon any change in the law, but only upon the recognition that the Sixth Circuit's analytical approach is as faithful to this Court's *Bose* teaching as it is possible to be, and that the record amply demonstrates that Respondent's verdict rests upon clear and convincing evidence of actual malice.

The judgment must be affirmed because (a) the jury's actual malice determination is predicated upon evidence of actual malice that is even greater than clear and convincing, and (b) the Court of Appeals' judgment of affirmance was entirely faithful to the process of independent *de novo* review of the actual malice determination required by *New York Times* and *Bose*, insofar as it is possible to understand and carry out that process.

Moreover, the Court should discard the independent appellate review component of the *New York Times* rule and overrule *Bose*, inasmuch as such review is constitutionally troublesome and practically infeasible.

The record overflows with evidence of actual malice. A survey of the law demonstrates that the verdict rests comfortably upon principles of law established by this Court in its seminal libel opinions.

It is respectfully submitted that the Court should take guidance from the opinion of the original panel of the D.C. Circuit in *Tavoulareas*, as did the Sixth Circuit, recognizing that if appellate review is not limited to the ultimate constitutional fact — whether there was actual malice — the process will eviscerate the role of the jury and vest appellate courts with original jurisdiction in libel actions.

Even if the Sixth Circuit had reviewed each separate factual issue, *Harte-Hanks* would only be buried deeper in fault. Moreover, contrary to Petitioner's contention, all of the Court of Appeals' subsidiary findings on which the jury could have found actual malice are abundantly supported by cogent evidence.

Finally, the Seventh Amendment appears to stand as an insurmountable obstacle to the independent appellate review process mandated in *Bose*. This case is a ideal vehicle for overruling *Bose* and treating public figure libel cases like all other cases.

ARGUMENT

(A) Introduction

The Supreme Court's decision to review this judgment at a time when the case law is replete with misgivings concerning *New York Times* and its progeny presents Respondent with a unique opportunity to rekindle the debate about public figure libel law.

Justice Black stated unequivocally that, "... to review the factual questions in cases decided by juries ... is a flat violation of the Seventh Amendment." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 171 (1967), Black, J., dissenting. Justice White has, "increasing doubts about the soundness of the Court's approach," in the *New York Times* case, even though he joined in the judgment and opinions in that case and in later decisions extending the *New York Times* standard. He has since become, "convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985), White, J., concurring. Justice White recognizes that under the *New York Times* rule the, "plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation." *Id.* at 768. He went on to observe:

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Id. at 769.

One who has secured a favorable verdict for a public figure, has persuaded an appellate court that that verdict is supported by clear and convincing evidence, and is arguing the same evidentiary considerations once again in the United States Supreme Court as though this Court were a court of original jurisdiction or another jury, appreciates the characterization of the process of independent appellate review which appears in Chief Justice Rehnquist's dissent in *Bose*, wherein he stated that the:

facts dispositive of [a *de novo* review of the "constitutional facts" surrounding the "actual malice" determination] — actual knowledge or subjective reckless disregard for truth — involve no more than findings about the *mens rea* of an author, findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context.

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 515 (1984), Rehnquist, J., dissenting.

This case perfectly illustrates the practical infeasibility of an appellate *de novo* fact review of the "actual malice" determination, where, as here, a record is so permeated with evidence of a newspaper's recklessness that no appellate court could vitiate the jury's verdict except by reversing every one of the jury's many "*mens rea*" determinations and credibility assessments, obvious and subtle, without having heard or observed any of the witnesses. "Courts, including this one, are not annointed with any extraordinary prescience." *Rosenbloom v. Metromedia*, 403 U.S. 29, 79 (1971), Marshall, J., dissenting. No experienced trial lawyer will take issue with the view expressed by Justice Harlan, dissenting in *Time Inc. v. Pape*, 401 U.S. 279, 294 (1971), that he could not discern in the First Amendment,

... [A]ny additional interest that is not served by the actual-malice rule of *New York Times* but is substantially promoted by utilizing this court as the ultimate arbitor of factual disputes in those libel cases where no

unusual factors, such as allegations of harassment or the existence of a jury verdict resting on erroneous instructions, . . . are present.

Id.

If this Court is considering discarding or limiting the *de novo* appellate review component of the *New York Times* rule and overruling *Bose*, we urge it to do so in this case.

We would not want the Court to misperceive our position, however. The verdict and appellate judgment under review, founded as they are upon as powerful a record of clear and convincing evidence of actual malice as any plaintiff could wish to adduce, will pass muster under the strictest standard of proof and review. If, as Justice Scalia stated in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570-1571 (D.C. Cir. 1984), *vacated and remanded*, 477 U.S. 242 (1986), "the 'clear and convincing evidence' constitutional standard in public figure libel cases is similar to application of the 'beyond a reasonable doubt' constitutional standard in criminal cases," the verdict in this case was properly secured. Moreover, even if Petitioner were correct that the verdict must pass appellate scrutiny of each separate underlying and subsidiary factual issue, a contention which is demonstrably incorrect, such exhaustive scrutiny would only reinforce the conclusions the Sixth Circuit has reached.

To a survey of the record we now turn.

(B) The Record Is Overflowing With Evidence Supporting The Jury's Verdicts On Every Issue

An examination of the record will convince even the most defense-biased student of libel litigation that this was a case which the defendant had little chance to win, even with the law stacked against public figures, for the evidence weighed heavily in the plaintiff's favor. Indeed, Connaughton's evidence on every count, including the newspaper's intention to injure him, was overwhelming and, to a large extent, un-

controverted. Concluding the liability case, the newspaper's general counsel, James Irwin, admitted that at the final prepublication conference, he was told by the editorial director, the managing editor and the publisher that Alice Thompson's defamatory statements about Dan Connaughton, which the paper was preparing to publish, were all the result of Thompson's misinterpretations of what she heard.² Thus, the defendant's knowledge that the libelous statements were probably false was conceded by the defendant's lawyer.

That Irwin, armed with that knowledge, advised the newspaper that there was no legal reason not to publish the article, is beyond comprehension. Interestingly, the jury requested that Irwin's testimony be read to them (Record at 928), and we may thus conclude that the jury gave it the considerable weight it deserved in reaching several verdicts.

Irwin's remarkable concession is enough, without more, to support the jury's verdict on both falsity and actual malice. Where, as here, a newspaper published statements about a lawyer which it knew had the potential to harm him professionally, while knowing that such statements represented a misunderstanding of fact on the part of their author, the newspaper published falsehoods when it "in fact entertained serious doubts as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The jury's several verdicts in favor of the plaintiff were based upon far more than the testimony of James Irwin, however, and we now endeavor to summarize the clear and convincing evidence that supports each of those verdicts.

² "I was told as we went over this line by line that Dan Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips." (J. App. at 196).

Petitioner goes out of its way to refer to that as a strained interpretation of Irwin's testimony, but the transcript demonstrates otherwise. Irwin, an experienced lawyer, was asked at trial whether he made that precise statement during his deposition and he acknowledged that he did. *Id.*

(C) The Plaintiff Proved By Clear And Convincing Evidence That The Article Was Defamatory

"A statement is defamatory where taken as a whole it causes injury to a person's reputation . . . or affects such person adversely in a trade or profession." Charge to Jury (Record at 911).

The record is glutted with testimony that the article had the potential to harm the plaintiff and that the *Journal News* knew that before it decided to publish it. Joe Cocozzo, the publisher, admitted that it was because he recognized the potentiality of harm in the article, indeed its potentially libelous nature, that he felt the paper had an extra duty to doublecheck and be as accurate as it could possibly be. That was the reason he scheduled a prepublication meeting "to go over it one more time," not something the newspaper customarily did. (J. App. at 95, 96). The article's author, reporter Pam Long, acknowledged that in questioning the plaintiff at the *Journal News* offices the day before the article was published, she said to Connaughton (of the Thompson accusations the paper was preparing to publish), "that seems to be a hefty charge against you." (J. App. at 277). James Irwin admitted that the things the newspaper said about Connaughton, if said about him (Irwin) would have the potential to harm him professionally; that such statements could harm a lawyer's professional reputation. (J. App. 193).

Dan Connaughton had the following impression of the way in which the article portrayed him:

I believe that the article portrayed me as a person that is engaged in, at the very least, unethical conduct if not illegal conduct and certainly portrayed me to be a person that would be unfit for public office and I think contained therein is the intimation that I was a person that was suborning perjury and trying to alter the grand jury testimony in some way.

* * *

Finally, by intimation, there is a part of the article that suggests that I had attempted to blackmail the incumbent judge by presenting him tapes in order to get him to resign. (J. App. at 128).

Prosecutor John Holcomb conceded that if a person were to play a tape for a public official for the purpose of forcing him to resign, that would be extortion. (J. App. at 153). Former Common Pleas Judge Arthur Fieher said the article had a detrimental effect upon Connaughton's reputation and that, based upon his political experience, he was of the opinion that an article of that kind could affect the outcome of an election. (J. App. at 101). Attorney David Green testified that, based on personal observations and conversations with other members of the community, it was his opinion that the article was extremely detrimental to Connaughton's campaign for Municipal Judge and also to his law practice. (J. App. at 102). "In this business . . . the only thing that you really have to sell is your reputation. That is, your reputation to exercise mature, intelligent judgment, and when you get into a situation where you have claims such as he tried to bribe Grand Jury witnesses, it can't do anything but have a detrimental effect on your business." (Record at 333).

(D) The Plaintiff Proved By Clear And Convincing Evidence That The Article Was False

A publication is false when it's not substantially true. The truth or falsity of a publication is based upon its nature and obvious meaning, taking into consideration the publication as a whole. A publication should be considered substantially true if the actual truth would produce the same impression on the reader as the statement which was made. Charge to Jury (Record at 911).

In order to merit a jury verdict in his favor on the issue of falsity, the plaintiff was required to demonstrate that the

statements which the *Journal News* attributed to Alice Thompson—that Dan Connaughton promised jobs and trips to her sister and her, promised her anonymity and said that he was going to play the tapes of the Stephens/Thompson interview to Judge Dolan to force him to resign—were not substantially true. Finally, in order to earn an affirmative verdict at the liability phase of the trial, the plaintiff also had to prove that the *Journal News* entertained serious doubts as to whether those charges were true at the time it published them. Appreciating that there is a kinship between the proof of falsity and the proof of actual malice, the Court will also appreciate why some of the evidence on these two issues is inevitably overlapping.

The most persuasive evidence that the article was false is the admission of James Irwin that at the prepublication meeting the editorial decision-makers told him that Thompson simply misinterpreted what Connaughton said to her. (J. App. at 196). The spontaneous yet consistent testimony of the many persons who participated in or audited the Connaughton/Berry interview of Stephens and Thompson on September 17, 1983 at the Connaughton home further reinforces the absolute falsity of the quoted statements.

The jury heard the following question put to Dan Connaughton:

... everybody in the courtroom knows that you've heard the statement made that you made promises of jobs and trips to these ladies that night and either you or your wife supposedly made some promises of jobs or trips or celebration or something later on. I guess I need to ask you whether during that entire meeting you made any reference to any jobs or trips or promises or offered anything or said anything that could even be reasonably interpreted, misinterpreted as an offer or promise of anything. Did you?

And they heard his answer:

Never at any time. (J. App. at 119-120).

Connaughton was also asked:

Did you at any time say to either of these ladies, "I'm going to use these tapes, take the tapes and play them for Dolan or New or both of them, and try to force them to resign?"

Connaughton answered:

No, sir. (J. App. at 123).

In response to the question, "Did you promise their names would never come out in public?" Connaughton answered:

No, sir. They expressed that concern. I can't say who it was specifically. I said, "Only thing I can tell you is I really don't know where this is going to go, but insofar as I might have control over these things, we would try to keep their names from being prominently displayed in the public," so far as I could . . . (J. App. at 121).

Patsy Stephens, Alice Thompson's sister, who was in Alice's company on every occasion when either Dan or Martha Connaughton spoke with Thompson, was interrogated exhaustively as to whether either Dan or Martha Connaughton promised or offered either her sister or her anything, and Stephens answered unequivocally and repeatedly that they did not. The final question put to Stephens was:

Now, I'll ask you again, if at any time during that entire discussion that either Mr. or Mrs. Connaughton promised or offered you or your sister anything?

And Stephens' answer was:

No, sir. (J. App. at 63).

The defendants brought Stephens back to the stand for the purpose of discrediting Connaughton. The attempt backfired entirely, however, and Stephens reiterated that the testimony she gave earlier in the trial was the truth. (J. App. at 71, 75).

Systematically, the plaintiff showed the jury that the people who attended the September 17, 1983 meeting stated that no promises or offers were made to Thompson or Stephens. Dan Connaughton's wife Martha testified that neither she nor her husband nor Mr. Cox nor Mr. Berry discussed in any manner any jobs, trips or other offers or promises of any material goods to these girls in exchange for what they were disclosing. (J. App. at 113). Nor did Mrs. Connaughton discuss such things with Thompson and Stephens on any occasion. (J. App. at 114).

And both Ernest Barnes, the Deputy Fire Chief of the City of Hamilton, and his wife, Jeannette, a former employee of the *Journal News*, neighbors of the Connaughtons, who were asked to attend the September 17, 1983 interview as observers, testified unequivocally that Dan made no offers or promises to Thompson or Stephens at any time during that meeting. The *Journal News* regarded both Ernest and Jeanette as credible.³ The record also reflects emphatic denials of Thompson's allegations by Dave Berry who also was present at the September 17 meeting. (Record at 235; J. App. at 105-106, 110). It is worth noting that Jeanette Barnes called Larry Fullerton, assistant managing editor of the *Jour-*

³ Tom Grant, the *Journal News* police reporter sent along with Pam Long by Managing Editor Walker to interview Mr. and Mrs. Barnes because he was personally acquainted with them, testified that in his capacity as a police reporter he had known Ernie Barnes for several years and regarded him as a generally credible person; likewise, he was acquainted with Jeanette Barnes because she worked at the *Journal News* and he considered her a credible person. (J. App. at 90). If the *Journal News* regarded the Barneses as credible, how can it blame the jury for believing them? Would not the Barnes' statements that Connaughton made no promises or offers to Thompson be enough to cause the *Journal News* to regard the Thompson statements as improbable? This inquiry becomes particularly significant as evidence of knowledge of probable falsity, i.e., actual malice.

nal News, and invited him to attend the meeting, but he declined. Joint Exhibit 1 shows that Fullerton contributed to the story. (J. App. at 329).

Thus, by actual count, six of the eight people who were present during the September 17, 1983 taped interview of Stephens and Thompson—Patsy Stephens, Dan Connaughton, Martha Connaughton, Dave Berry, Jeanette Barnes and Ernie Barnes—told the jury that the charges Thompson leveled against Connaughton were utterly unfounded. This testimony constitutes clear and convincing evidence of falsity, particularly when considered in connection with the *Journal News'* admitted prepublication belief that Thompson simply misinterpreted what Connaughton said to her. This evidence is augmented by other uncontroverted evidence of falsity. That other evidence is of two types, the first of which casts a dark cloud over Thompson's credibility; the balance of which demolishes it. The former evidence came from Thompson herself and was known by the *Journal News* at the time it made the decision to publish her accusation against Connaughton.

When Thompson was interviewed by Blount and Long she told them she was unemployed. In fact she was working at Rinks two and a half days a week. (J. App. at 169-170). At trial Thompson testified that Dan Connaughton's voice was on the tapes of the September 17, 1986 meeting. (J. App. at 170). When Blount and Long interviewed her, however, she told them several times that if they listened to the tapes they wouldn't hear Dan's voice because he turned the tapes off before he talked. (J. App. at p. 295, Def.'s Exh. J). Thompson also told the jury that not all of Dan's questions were leading and that sometimes there was an open discussion. (J. App. at 170). But she acknowledged that she had told Long and Blount when they interviewed her on October 27, 1983, that Dan led her and all she could say was yes or no. "Yes, I did say that." (J. App. at 171). Thompson also admitted that she had been a patient in Hughes Psychiatric Hospital and had also been hospitalized at Mercy Hospital for taking an

overdose of drugs and for a suicide attempt. (J. App. at 176). She also admitted that after her name was listed as a grand jury witness in the newspaper she was worried that people would think she was a "snitch" and went around telling everything she knew on people. She told her sister Patsy that in order to counteract that impression she was going to tell the newspaper that she made the disclosures about Billy New and Judge Dolan because Connaughton induced her to do so with offers and promises of jobs and trips. (J. App. at 177). She wanted the *Journal News* to run a story about why she made the statements to Connaughton. She asked attorney Matt Crehan, who had represented her in an assault charge, to arrange the meeting. (J. App. at 178).

The jury had previously heard Blount admit that when Hank Masana asked the *Journal News* to listen to Alice Thompson, Blount knew that Masana represented Billy Joe New (J. App. at 27) and that he was a supporter of Judge Dolan. (Record at 69-70). Blount also admitted that Thompson told Long and him that she had twice been convicted of crimes in the Municipal Court, once of shoplifting (a crime of deception) and once of assault. (J. App. at 35). Is it any wonder that the jury chose to believe that Thompson's statements about offers and promises from Connaughton were not true, particularly when Thompson's credibility was pitted against that of her sister Patsy, the Connaughtons, Dave Berry and the Barneses?

If the foregoing is not sufficient evidence that the article was false, consideration should be given to the numerous material inconsistencies between the transcript of the October 27, 1983 Blount/Long interview of Thompson (J. App. at 278, Def.'s Exh. J) and the tape of the September 17, 1983 interview of Thompson and Stephens at the Connaughton house (Pl.'s Exh. 34), which the jury heard in its entirety twice, first during the plaintiff's case in chief and again during its liability deliberations. (A transcript of its contents is Plaintiff's Exhibit 33). That tape dispositively disproves the charges Thompson leveled against Connaughton and goes a long way toward proving the plaintiff's case on actual malice as well.

For example, contrary to what Thompson told Blount and Long, Thompson did not ask what she was going to get out of it; Connaughton's voice was *on* the tape a substantial part of the time; Connaughton did not ask many leading questions but induced a full discussion; he did not promise the ladies anonymity; Connaughton did not say that he intended to play the tapes for Dolan and New to force them to resign; and at no time did Connaughton make any reference to any offers or promises of anything to anybody. Indeed, the only conclusion that can reasonably be reached from listening to the tapes of that September 17, 1983 meeting is that the account which Alice Thompson gave Blount and Long of the discussion which she held on that occasion with Dan Connaughton is incorrect in every material respect. That conclusion, coupled with Thompson's known unreliability and motivation to fabricate a story about her interview with Connaughton, and the testimony of the many credible witnesses that Connaughton made no promises or offers to Thompson and Stephens, made the task of finding for the plaintiff on the issue of falsity an extremely easy one for the jury. As stated previously, most of the evidence that the article was false is also evidence that the *Journal News* knew that it was false and thus published those falsehoods with actual malice. Thus, the transition from a discussion of the evidence of falsity to that of actual malice is natural and logical.

(E) The Plaintiff's Proof That The *Journal News* Published The Article With Actual Malice Is Not Merely Clear and Convincing; It Is Almost Uncontroverted

A publication is made with actual malice when made with the knowledge that it is false or with reckless disregard of whether it is false or not. A reckless statement is one made with serious doubt as to the truth of the statement before its publication. Actual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer. Rather, the focus of the inquiry is on the defendant's at-

titude towards the truth or falsity of the publication. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of its publication.

Charge to Jury (Record at 911-912.)

The exhaustive documentation of the plaintiff's proof of actual malice would overwhelm both the writer and the reader. The record is replete with evidence, both direct and circumstantial, that those who made the final decision to publish the November 1, 1983 article which harmed Dan Connaughton well knew that Alice Thompson's charges against Connaughton were either deliberate fabrications or the emanations of a disordered mind which had badly misinterpreted innocuous amenities. But the *Journal News* was on a predetermined course to damage candidate Connaughton. Its single-minded preoccupation with its political objective left no room for further investigation of the facts, fair evaluation of the information that it had gathered, or the self-restraint to avoid publishing libelous statements whose truth it seriously doubted.

(1) Direct Evidence of Actual Malice

The admission of James Irwin that at the prepublication conference, the publisher, manager, editor and editorial director told him that Thompson's charges against Connaughton were based on misinterpretations (J. App. at 196) is consistent with that of Pam Long, author of the libelous article, who admitted that when she wrote the article she was unable to make an assessment of the truth or falsity of Thompson's claims. (J. App. at 59). Long went on to say that at the time she wrote the article she believed that Thompson believed what she said.⁴ Seeking to drive home the difference

⁴ Of course, Long's admitted inability to determine whether Thompson's statements were true could have been overcome if she had used either of the two available means to verify them, listen to the tapes or interview Patsy Stephens. She wrote the article without doing either.

between Long's believing that Thompson believed what she was saying and Long's believing that Thompson's statements were actually true, plaintiff's counsel asked this question:

Saying you believed she said it, she believed it, is not the same thing as saying you believe that Dan Connaughton said it, is it?

The Court then terminated the interrogation on this issue, saying, "Mr. Lloyd, I think you made your point. Would you pass onto something else." (J. App. at 60). Presumably, the point was also made to the jury's satisfaction. Long simply did not know whether or not Thompson's accusations against Connaughton were true when she wrote the story. That is direct evidence of actual malice.

Moreover, James Blount conceded that he admitted when he was deposed that "there is no judgment on our part as to who was telling the truth." (Record at 638). That is also an admission that the newspaper entertained serious doubts as to the truth of the Thompson statements.

It is noteworthy that the deposition statements of Irwin, Long and Blount, which were acknowledged at trial, were all made before the District Court ruled that the neutral reportage defense was unavailable.⁵ It is a strong inference that those admissions were made in unguarded candor when the *Journal News*' lawyer, editorial director and reporter all held the erroneous belief that a newspaper has a right to publish what one person says about another so long as it also quotes the target of the attack in the same article. Viewed in that light, those admissions should be given extraordinary weight.

⁵ Order Denying Motion For Summary Judgment. (J. App. at 4, Doc. 24).

(2) **Circumstantial Evidence of Actual Malice**

(a) **Evidence Of The Journal News' Bad Faith Motive To Harm Connaughton**

The Court properly instructed the jury that in determining whether the newspaper published the article with actual malice, one of the elements they might consider was evidence of personal spite, ill-will or intent to injure on the part of the writer. Consistent with that principle of libel law, in order to show the jury that what the *Journal News* did was something it had a motive to do, the plaintiff demonstrated that the *Journal News'* November 1, 1983 front page article quoting Thompson's charges against Connaughton was the culmination of an evolving plan to damage Connaughton as a candidate for Municipal Judge a week before the election. It is clear from the events preceding the first of November, 1983 that the *Journal News*, and in particular James Blount, the editorial director, wished to do serious damage to the Connaughton campaign for two reasons: to help incumbent Judge James Dolan retain his position as Municipal Judge, and to reestablish the *Journal News* as the principal molder of political opinion in Hamilton. The two objectives were closely tied together.

Earlier in the campaign Blount had a visit from Judge Dolan, about whom rumors of corruption were rife. Dolan told Blount that the *Cincinnati Enquirer* had been investigating claims that Billy Joe New, Dolan's principal attaché, had been accepting bribes for fixing cases. The inquiry was beginning to focus on Dolan directly. Dolan asked Blount for advice. (J. App. at 18). Blount and Dolan were acquainted. The *Journal News* endorsed Dolan when he first ran for the Court. (J. App. at 19). At the time of Dolan's visit to Blount, New had resigned. It was common knowledge that the prosecutor had convened a grand jury to investigate charges against New and Dolan, principally because of the

taped statements Stephens and Thompson had given to Connaughton. Dolan was under intense pressure.

The next relevant event occurred on the morning of October 27, 1983, when the *Cincinnati Enquirer* published an exposé of the Dolan Court. (J. App. at 212, Pl.'s Exh. 2). Whatever the repercussions of that were for Judge Dolan, they were great for the *Journal News*. The local newspaper's position as the dominant political voice in Hamilton (J. App. at 22) had been preempted by the *Cincinnati Enquirer*. The *Enquirer* had wounded Hamilton Municipal Judge Dolan. The only recourse left for the *Journal News* to reestablish its political dominance was to control the outcome of the election by inflicting a mortal political wound to the challenger, Connaughton.

Blount went to work to get that done. Events were playing into his hands. Earlier, Hank Masana, Billy New's lawyer and a known supporter of Judge Dolan (Record at 69-70), had arranged with Blount and the *Journal News* publisher, Joe Cocozzo, for the *Journal News* to interview Alice Thompson. (J. App. at 26). She was trying desperately to find a way to create the public impression that she wasn't an ordinary "snitch" but had turned state's evidence against New only because Connaughton promised her sister and her jobs and trips. (Only she knows why she thought it would improve her reputation to have people think she had made these statements in exchange for a consideration.) Thompson had tried without success to tell her story to the *Cincinnati Enquirer*. (J. App. at 27).

On October 27, 1983, Blount and reporter Pam Long went to Masana's office and interviewed Thompson. (Record at 72). The interview was tape-recorded and a transcript was made of it. (J. App. at 278, Def.'s Exh. J). Blount and Long learned that Thompson hoped that the *Journal News* would publish her claim that she talked to Connaughton only because he promised benefits to her sister and her. (J. App. at 36). They learned that she had a history of psychiatric illness

and a criminal record. (J. App. at 35). They heard her say that when she and Patsy were interviewed at the Connaughton home she asked what the interview was all about and then Dan turned off the tape (J. App. at 172) and promised them jobs and trips. They heard her say that Connaughton turned the tapes on and off so that he could make the inducements without recording them, that if they listened to the tapes of that interview they would not hear Dan's voice (J. App. at 29, 30), that Dan promised her anonymity, that Dan said he was going to play the tapes for Dolan to force him to resign and make no further use of them. (J. App. at 180). She also told Blount and Long that her sister Patsy would back up her statements about the promises and offers. (J. App. at 32).

Blount and Long thus had statements from a young woman with a history of psychiatric illness, a criminal record, and a wish to publish her reasons for "snitching" on Billy New, accusing a lawyer of good repute of inducing testimony with promises and offers of jobs and trips. And this woman had come to the *Journal News* under the auspices of a lawyer who had reason to encourage her to make statements helpful to his client, Billy New, and his ally, incumbent Judge Dolan.

Red lights were flashing all around Thompson. And there were a number of ways to verify whether Thompson was telling the truth. The best way would have been to listen to the tapes of the September 17, 1983 interview to determine whether what Thompson said about the discussion was true. Another excellent way would have been to ask *all* of the other persons who attended that interview whether what Thompson said was true, particularly Patsy Stephens, who Thompson told the *Journal News* would back up her statements and who was alleged to have been the other recipient of the promises and offers.

Bob Walker, the *Journal News*' editor in chief, called a number of reporters to a meeting in his office on Friday, October 27th. A predetermined list of questions was given to

each reporter based on Long's notes of the interview with Thompson. Each person known to have been in attendance at the interview Connaughton held with Stephens and Thompson — save Patsy Stephens — was targeted, and reporters were assigned the task of interviewing one or more of these persons. All of the interviews were supposed to be held separately and simultaneously on the following Monday, October 31, so that the persons interviewed would have no opportunity to square their stories. (Record at 208-212).

Before that was to occur, however, Jim Blount prepared the *Journal News*' readers for what he was planning to do to Dan Connaughton. He made an attack on the *Enquirer* in his Editor's Notebook column in the Sunday, October 30th, *Journal News*. (J. App. at 207, Pl.'s Exh. 1). In that column not only did Blount criticize the *Enquirer* for giving the Dolan story front page coverage, he questioned the *Enquirer*'s credibility.* Linking the *Enquirer* to Connaughton, Blount also stated that, "Also surfacing periodically through the campaign has been the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-maker." (J. App. at 207, Pl.'s Exh. 1). Blount admitted that it is somewhat unusual to criticize another newspaper. (J. App. at 20). The *Enquirer* and the *Journal News* were the two papers having the largest circulations in the Hamilton community. (J. App. at 21). In the area served by the Hamilton Municipal Court, the *Journal News* had a larger circulation than the *Enquirer*. Blount would like to think that the *Journal News* had a greater capacity to influence public opinion in Hamilton than the *Enquirer* did. "We like to get a story ahead of them, but it's like the Bengals and the Steelers. Sometimes the Steelers are going to win and sometimes the Bengals are going to win." (J. App. at 22).

* "Stories on the Dolan-Connaughton fight in the *Enquirer* last week certainly helped fuel the fire. But in the process the motives and the credibility of the Cincinnati newspaper is in question. . . . Judge Dolan suggested an answer when he charged Jim Delaney with threatening a page one smear Thursday morning . . ." (J. App. at 207, Pl.'s Exh. 1).

In his October 30, 1983 column, Blount signaled several attitudes that are relevant to the issues in this case: (i) that the *Journal News* was smarting from the *Enquirer's* scooping the *Journal News* about the judicial election in Hamilton; (ii) that the *Journal News* resented the *Enquirer's* treatment of Judge Dolan; (iii) that the *Journal News* also resented the fact that the *Enquirer's* exposé of Dolan had boosted Connaughton's campaign; and (iv) that the *Journal News* was evincing a tendency to behave recklessly in publishing a rumor about Connaughton for which it had no evidentiary support (J. App. at 23).

Having telegraphed its unsubtle game plan, the *Journal News* proceeded to execute it. On Monday, October 31, 1983, most of the planned interviews were conducted. Not one of the people who was interviewed corroborated Thompson's story. (Record at 223). And two of those who said there was no truth to what Thompson said were persons whose credibility the *Journal News* acknowledged to be beyond challenge — Deputy Fire Chief Ernest Barnes and his wife, Jeannette. The *Journal News* also interviewed Dan Connaughton, who not only unqualifiedly denied making any offers or promises to Thompson or Stephens but tried to help the *Journal News* understand why Thompson might have misinterpreted what she heard.⁷ During that interview, Blount and Long asked Connaughton repeatedly whether he would give them tapes of the September 17, 1983 interview, conveying the impression that they were most anxious to listen to the tapes. (J. App. at 259, Def.'s Exh. I). The tapes were freely turned over to them. But Blount and Long admitted that they never listened to them. (J. App. at 33). After all, with their decision to publish the story already made, the

⁷ "She was getting an enormous amount of pressure from street people who were calling her all kinds of names and she was very disturbed and upset by the fact that I was the cause of this and while, as I asserted before, I never promised anonymity or any such thing, I told the *Journal News* that I could understand how she could feel." (J. App. at 127.)

last thing they needed was to be confronted by even more evidence that Alice Thompson's statements were patent fabrications.

The other evidence that the *Journal News* did not want to confront was what Patsy Stephens would have to say. The *Journal News's* disdainful disinterest in Patsy's testimony is evidence of reckless disregard for the truth.

(b) In Re Patsy Stephens

The fact is that the *Journal News* made no attempt to reach Patsy Stephens prior to the time the article was published. Pam Long's explanation for not trying to reach Stephens is that Connaughton said that he would put Stephens in touch with the newspaper. Connaughton was asked, "Did you at any time on the thirty-first of October, 1983, tell Ms. Long, Mr. Blount or anybody else at the *Journal News* that you would try to get Patsy Stephens to come in and talk to them?" His answer was, "Not at all. That subject matter never arose at any time." (J. App. at 142).

Publisher Joseph Cocozzo, who made the ultimate decision to publish the article (J. App. at 92), was aware that at the time he made the decision, Stephens had not been interviewed. But he was not aware that no attempts had been made to contact her. He "was made aware that we had thought we were going to talk to her the day before. . . . In fact, there was some hope that we could have talked to her that Tuesday morning prior to publication. . . . In all honesty, I would say that the time I approved, gave my permission to run it, I had interpreted that as meaning that we had a firm appointment to talk to her." (J. App. at 94).

Managing Editor Bob Walker was aware that whatever was said to Alice was supposedly likewise said to Patsy, and it occurred to him it would have been good practice to contact Patsy Stephens. (J. App. at 84). But he said, "We would like to have talked to Patsy Stephens, we had no way to reach her." He said nobody tried to reach her on Friday, Saturday,

Sunday or Monday. (J. App. at 84). Walker said that to his knowledge Pam Long did not try to interview Stephens at all before the article was written. (J. App. at 85). But when Walker was deposed prior to trial he said he believed Pam Long attempted to interview her prior to publication. Walker later corrected his deposition and said he was mistaken when he made that statement. (Record at 214-215). In any event, at the time of the prepublication conference Walker still thought it was important to contact Stephens. (J. App. at 86). But like Cocozzo, he failed to take any steps to hold up publication of the article until after the *Journal News* could interview her.

General Counsel James Irwin said that he understood that there had been no contact with Patsy Stephens prior to publication. It did not occur to him that responsible journalism indicated that she should be contacted before the article was published to see whether she confirmed Alice Thompson's statements. (Record at 808-809).

Jim Blount's confusion about the *Journal News*' failure to contact Stephens is as strange as his explanation of why he didn't listen to the tapes he was so very interested in obtaining. During the *Journal News*' interview with Thompson Blount asked her, "What's your sister's position in this? Would she support you or would she support him?" Thompson assured him Stephens would affirm her statements. (J. App. at 255, Def.'s Exh. I). Blount agreed that "at that time" it would have been interesting to hear her comments. (J. App. at 32). Indeed, Blount knew that it was Stephens, not Thompson, who was the main player so far as supplying information about Billy New on the operation of Judge Dolan's Court was concerned. (J. App. at 32-33).

When he was deposed on May 31, 1984, Blount testified that he was at Pam Long's desk on the afternoon of October 31, 1983 (the day before the article was published) and he knew that Pam Long was talking to Stephens "and they mutually agreed that they both could not talk at that time." Blount had a reason to remember that this phone conversation occurred on October 31st. "That was Halloween and

Pam Long had made a commitment to her daughter to go frick or treating. I think Pat or Patsy, whatever her name was, decided that she would rather wait until the next morning." (Record at 109-110).

Pam Long testified that neither she nor any other representative of the *Journal News* even tried to reach Stephens before the article was published. (J. App. at 56). She also admitted that when Walker, the managing editor, assigned reporters to interview people who were present during the September 17, 1983 session at the Connaughton home, the one person who was present at that meeting who was not on the list to be interviewed was Patsy Stephens. (*Id.*) Long attempted to explain that by saying that when she and Blount interviewed Connaughton on October 31st, he "volunteered to help Patty get in touch with us and so based on that representation we assumed that Patsy would get in touch with us." (J. App. at 57).

That explanation is not credible, not only because Connaughton denied that during his discussion with Long the subject of putting Stephens in touch with Long ever came up, but also because Long cannot explain the *Journal News*' failure on October 28th to assign someone to interview Stephens on the ground that on October 31st Connaughton volunteered to put Stephens in touch with Long.

Considering all of the foregoing, the jury could not help but regard the failure of Blount and Long to interview Stephens, who would have told them that Thompson's statements were utterly untrue, as evidence that Blount and Long did not wish to hear Stephens discredit Thompson. If the jury inferred that Blount and Long purposely avoided interviewing Stephens in order to circumvent yet another obstacle to publishing Thompson's statements, such an inference was rationally based. Further, if the jury also inferred that Blount dissembled with Walker and Cocozzo about attempts to interview Stephens, that inference was also rationally based.

(c) Other Suspect Behavior Evidencing Actual Malice

Alice Thompson told Blount and Long that she had informed the Hamilton Police that Connaughton made promises and offers to her. (J. App. at 278, Def.'s Exh. J). An excellent way to check her credibility would have been to ask the police whether that statement was true. Cocozzo asked Blount whether the police had been contacted about this. Cocozzo said he was told by Blount that the *Journal News* had checked with the police and the police said they did not have time to check those claims out. Cocozzo was given the impression that either Blount or Tom Grant, the police reporter, asked the police that question. (J. App. at 95). Bob Walker also said that Blount told him he asked Tom Grant to contact the police to determine whether Thompson told them the same tale about Connaughton that she told the *Journal News*. (J. App. at 86-87).

Jim Blount told two diametrically opposite stories about this, as he did about Pam Long's attempt to reach Patsy Stephens. When his deposition was taken, Blount said that he asked Tom Grant to ask that question [whether Miss Thompson told them the same thing she told Blount about inducements from Mr. Connaughton] starting with the chief and then to get the chief's permission to follow it as far as he could. He then stated that "Mr. Grant's report back to me was they did not pursue that line of questioning. They were only interested in Billy New in court." (J. App. at 38).

But Tom Grant made it clear that Blount gave him no such assignment. Grant's first involvement with the November 1, 1983 article about Connaughton was the day before the interview was published, when he and Long went to the Barnes' home to interview Ernie and Jeanette. Earlier that same day Blount asked him to check with the Hamilton Police to see if the investigation on Billy New was continuing.

Blount did not even tell Grant that a woman named Alice Thompson had come to the *Journal News* with charges

against Connaughton and the paper wanted to verify them; he did not ask Grant to go to the police and ask them whether Thompson told them what she told the newspaper; nor did Blount even tell him to ask the Police about Thompson's general credibility. (J. App. at 88).

When he testified at trial, Blount told a story that varied from his deposition testimony but was still substantially at odds with what Grant said. Blount continued to say that he asked Grant to ask the police whether Thompson told them what she told him about Connaughton and that Grant couldn't verify from them that she made such a statement. Blount then said he spoke with some policemen about the matter. (J. App. at 37-38).

Apparently, Blount misrepresented to Walker and Cocozzo that he tried to check out the Thompson story with the Hamilton Police when he really hadn't and then tried to cover his tracks as best he could. By this time, the jury's assessment of Blount's credibility was no doubt at point zero. Blount probably dissembled with Walker and Cocozzo about attempts to check out the Thompson statements with the police as he did about attempts to reach Patsy Stephens. The circumstantial evidence that Blount was not going to let anything prevent the publication of the Connaughton story is compelling indeed.

One further evidentiary discrepancy doubtless added to the jury's conclusion that the *Journal News* went out of its way to do a hatchet job on Dan Connaughton. At no place in the transcript of the Blount/Long interview of Alice Thompson does Thompson make any reference to "dirty tricks" or say that Connaughton's offers and promises were "in appreciation for" her testimony. Yet the phrase, "dirty tricks," is featured in the *Journal News*' front page story. When asked about that, Long said that Thompson used the phrase, "dirty tricks," at the beginning of the conference prior to the taping. "When we were preparing the article, it became very clear that we needed a paragraph to explain what she was — what

was coming to the *Journal News*. And it was very apparent that the word dirty tricks was there. Mr. Blount and I had both heard it and it was used to describe that." (Record at 554-555, our emphasis). That seems unlikely, however, as "dirty tricks," a political trigger phrase that became popular in the Watergate days, is more likely to have been supplied by Blount than used by Thompson. And it is significant that in describing the designing of the article, Long twice used the word, "we," suggesting that Blount participated in the construction of the story.

(F) A Survey Of The Applicable Law Shows That Daniel Connaughton's Judgment Was Secured Under Established Legal Principles.

Harte-Hanks and its media *amici* strive mightily to persuade the Court that Dan Connaughton's victory has been achieved at a sacrifice of established law and traditional values. When one evaluates the record against the context of extant and applicable principles, however, the conclusion is inescapable that the verdict and the existing law of libel can comfortably coexist.

For example, Justice White taught us in *St. Armant v. Thompson*, 390 U.S. 727, 730-731 (1968), that "Professions of good faith will be unlikely to prove persuasive. . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Jim Blount and Pam Long admitted to having numerous compelling reasons to doubt Alice Thompson's veracity.

In *Herbert v. Lando*, 441 U.S. 153, 164 (1979), this Court affirmed that malice may be established both by direct proof of state of mind [such as the admissions of Irwin, Blount and Long] or by showing all relevant circumstances concerning the publication.

In a well-reasoned opinion, the original majority of the D.C. Circuit in *Tavoulares v. Piro*, 759 F.2d 90, 114 (D.C. Cir. 1985), rev'd *en banc*, 817 F.2d 762 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 200 (1987), consisting of Senior Circuit Judge MacKinnon and then Circuit Judge Scalia, articulated the principle that, "In any case where the mental state of an actor is at issue, it can be proved by the *cumulation* of circumstantial evidence." That is one of the means the plaintiff employed to prove actual malice in this case. The *Tavoulares* panel affirmed the statement from *Curtis Publishing v. Butts*, 388 U.S. 130, 169 (1967), that, "... evidence that a newspaper followed a sensationalistic policy, because it provides a *motive* for knowing or reckless falsehood, is evidence of actual malice." *Tavoulares*, *supra*, at 117. Personal motives on the part of a newspaper [such as to salvage an incumbent judge and reestablish a newspaper's political influence] are evidence of recklessness or willful disregard for the truth which may be considered along with other evidence of malice.

... one who is seeking to harm the subject of a story — whether motivated by simple ill will, or partisan political considerations, . . . or a mere desire to attract attention and boost circulation — is more likely to publish recklessly than one without such motive.

Id. at 118 (citations omitted).

And heavy reliance on a source whom the defendant knows to be biased and unreliable [Alice Thompson] in itself demonstrates reckless disregard for the truth. *Id.* at 127; *St. Armant*, *supra*, at 732. Knowledge of the harm that is likely to follow publication of a story is relevant to whether it was published with actual malice. *Curtis*, *supra*, at 170; *Tavoulares*, *supra*, at 131. Publisher Cocozzo and lawyer Irwin both testified that they knew the article would harm Connaughton when they decided to publish it.

The *Curtis* Court also recognized that "... highly unreasonable conduct constituting an extreme departure from

the standards of investigation and reporting ordinarily adhered to by responsible publishers," *Curtis, supra*, at 158, such as publishing an uncorroborated statement from a source known to have been convicted of a crime of dishonesty [Alice Thompson], failing to interview a witness who was with the source when the reported conversation was overheard [Patsy Stephens], failure to view a game film [or listen to a tape] to determine whether the informant's information was accurate, is evidence of recklessness amounting to actual malice. *Id.*, 157-158.

It is thus clear that the jury properly based its conclusion that Connaughton's proof of malice was clear and convincing upon its consideration of a mix of the exact type of direct and circumstantial evidence which this Court has consistently equated to recklessness on the part of publishers.

(G) The Judgment Was Appropriately Affirmed By The Sixth Circuit.

Petitioner argues that the Court of Appeals applied an incorrect standard of review, and, mirroring Judge Guy's dissent, that certain statements which Connaughton made to the *Journal News* mandate a reversal of the judgment.

Judge Krupansky, writing for the Court, assiduously traced and applied the evolving *New York Times* rule to this case, and, moreover, gave the record as exhaustive an independent review as the most stringent reading of *Bose* could command. The Court of Appeals doubtless understood that Harte-Hanks was urging it to substitute Petitioner's view of the evidence for that of the jury in derogation of Connaughton's right to a jury trial guaranteed by the Seventh Amendment. The Sixth Circuit also understood that inasmuch as the entire record contained sufficient evidence of actual malice to support a plaintiff's verdict, Connaughton was clearly entitled to have the jury believe his version of the facts instead of the newspaper's, and therefore to prevail on appeal. The fact that Petitioner does not agree with the jury's or the Trial Court's

or the Court of Appeals' view of the evidence is beside the point, as this Court has never stated that in order for a public figure to recover against a newspaper the evidence of actual malice has to be uncontroverted. "The plaintiff need not obtain an admission of fault from the defendant." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *vacated and remanded*, 477 U.S. 242 (1986).

There is nothing in *Bose* in which the Petitioner can take comfort and much which cuts against its position. Contrary to what Petitioner asserts, *Bose* does not deal the "clearly erroneous" standard of appellate review out of public figure libel litigation, but, rather, as the Court of Appeals recognized in this case, strikes a pragmatic balance between Rule 52(a) and the rule of independent review applied in *New York Times*, being "faithful to both." *Connaughton, supra*, at 829. A finding may be set aside only where, "the reviewing court *on the entire record* is left with the definite and firm conviction that a mistake has been committed," minding the command of Rule 52(a) that "'due record' shall be given to the trial judge's [or jury's] opportunity to observe the demeanor of the witnesses." *Id.*

Petitioner would have this Court regard *Bose* as authority for the hypothesis that its blatant mischaracterization of Connaughton's speculation as to why Thompson may have misunderstood him,⁸ buried under an avalanche of evidence

⁸ The *Journal News* quoted Thompson as claiming that during the taped interview on September 17, 1983, when the tape was turned off, Connaughton made promises about a job and a post-election trip to Florida for Thompson and Stephens (Joint Exhibit I, J. App. at 333). Not only did Connaughton unqualifiedly deny that he made any offers or promises, he made it clear to the *Journal News* that any comments by his wife Martha that Thompson may have misinterpreted as offers or promises were made at a later time, not at Connaughton's house, and that they had nothing to do with obtaining any information about the Municipal Court. He told Blount that the tape of his interview with Stephens and Thompson which he had given to Blount would, "speak for itself." (Defendant's Exhibit I, J. App. at 264, 5). Blount never listened to the tape. At trial Connaughton again flatly denied making any offers or promises.

of actual malice, somehow mandates a reversal of the judgment. However, the analytical method the *Bose* Court adopted trenches in the opposite direction. In *Bose* this Court went out of its way to make clear that the testimony upon which the reversal of the plaintiffs' judgment hinged would not have rebutted "any evidence of actual malice that the record otherwise supports. . . .", *Bose, supra*, at 512, had there been any such evidence. Understanding *Bose* correctly, the Court of Appeals did not misperceive Petitioner's disingenuous interpretation of Connaughton's answers as rebutting the overflowing evidence of actual malice which both the jury found clear and convincing. It is clear that the Sixth Circuit clearly understood the teaching of *Bose*. Judge Krupansky's observation is particularly instructive:

The dissent, by characterizing as admissions Connaughton's answers to the *Journal* reporter's hypothetical questions during the interview of October 31st, which questions were calculated to elicit purely speculative answers and conjectures, without considering Connaughton's expressed denials to direct questions concerning Thompson's controversial testimony and her purely subjective understandings of Connaughton's statements, or any of the other evidentiary evaluations of the con-

As the Court of Appeals concluded, the jury simply believed Connaughton and found defense counsel's argument that Connaughton's speculations were admissions to be unpersuasive. For any appellate court to substitute a contrary credibility assessment of Connaughton's testimony for that of the jury's would be to run roughshod over Respondent's 7th Amendment rights and violate this Court's teaching in *Bose* that "due regard shall be given to the [jury's] opportunity to observe the demeanor of the witnesses." *Bose*, at 499-50.

Inasmuch as the gravamen of Thompson's claim was that during the September 17th interview, when the tape was turned off, Connaughton promised Stephens and her jobs and trips as inducements for their statements then being taped about Dolan and New, Connaughton's speculation that Thompson might have misunderstood something his wife said days later could not rationally be seen as an admission of the truth of Thompson's charges.

flicting testimony, clearly demonstrates the wisdom of the Supreme Court's teachings in *Bose*, which were designed to protect a plaintiff's rights to a jury trial in a defamation case against invasion of the jury's fact-finding prerogatives anchored in credibility assessments of witnesses available only to the actual trier of fact.

Connaughton, supra, at 836, n.5.

(H) Petitioner's Contention That The Court Of Appeals Erred In Not Extending Its Independent Review Process To Each Underlying Fact Determination Is Clearly Incorrect

Contrary to Petitioner's assertion that *Bose* required that the Court of Appeals independently review each underlying factual issue present in the record, the Sixth Circuit, following the reasoning of the panel majority in *Tavoulareas*, decided that *Bose* contains no such requirement. Respondent urges this Court to take its guidance from the original panel Opinion in *Tavoulareas*, as did the Sixth Circuit.⁹

The *Tavoulareas* panel logically analyzed *Bose* as follows:

The issue *Bose* presents in the present context is whether we are to apply our independent judgment to

⁹ The panel reversed a judgment *n.o.v.* and reinstated a jury verdict for a public figure against the *Washington Post*. Upon rehearing *en banc*, the *en banc* majority reversed the panel and reinstated the judgment *n.o.v.*, *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (*en banc*), *cert. denied*, 108 S.Ct. 200 (1987). In this case the Sixth Circuit disapproved of the *Tavoulareas en banc* majority's opinion, stating that that Court, "... judged the credibility of witnesses without the opportunity of visual observations, it evaluated both the credibility and weight of the evidence, and denied the plaintiff his entitlement to have the evidence along with all inferences reasonably drawn therefrom to be viewed in the light most favorable to the plaintiff. The opinion appears to have accorded no deference to the pronouncements of the Supreme Court addressing issues of defamation, falsity, and malice enunciated in *New York Times v. Sullivan*,

each separate fact determination that forms the basis for the ultimate conclusion of "actual malice," or rather only to the ultimate conclusion of clear and convincing proof of "actual malice." For a number of reasons, we think the latter is the case.

First, the Court's expression of its holding in *Bose* is phrased only in terms of the ultimate issue; and certiorari had been granted only "to consider whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Court's 'finding' of actual malice." *Id.* at 1955.

* * *

Second, the court of appeals decision affirmed in *Bose* had *not* questioned the factfinder's preliminary factual determinations. The issue under review was whether it could properly be found defamatory, under an "actual malice" standard, for the defendant to print that the loudspeakers manufactured by the plaintiff caused musical instruments to sound as though they were wandering "about the room." As the Supreme Court noted, the court of appeals had accepted all the district court's factual findings, observing "that it 'was in no

376 U.S. 254 (1964), and its progeny; *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); and other milestone decisions that have, over the years, addressed those keystone issues. In sum, the *en banc* court appears to have intruded into the original jurisdiction of a trial court jury." *Connaughton*, at 842, n. 11.

The Sixth Circuit went so far as to state that, "The rationale of the *Tavoulareas en banc* majority has placed it squarely in the paradoxical position of discarding jury trials in actions for libel thereby denying the plaintiff his Seventh Amendment right to trial by jury." *Id.*, n. 10.

Respondent urges this Court to regard the *Tavoulareas en banc* majority's opinion as an aberration.

position to consider the credibility of witnesses and must leave such questions of demeanor to the trier of fact." *Id.* at 1955 (quoting 692 F.2d at 195). The Supreme Court noted with approval this refusal of the court of appeals to second-guess credibility findings of the factfinder. *Id.* at 1958. The Court likewise did not question them.

* * *

That *Bose* addresses only the ultimate question of actual malice is shown, thirdly, by its reliance upon the distinction between questions of fact (which are governed by Rule 52(a) and questions of law (which are for the court).

* * *

In sum, if the Court's statement in *Bose* that "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review," *id.* at 1964 n. 27, is not limited to the *ultimate constitutional fact* (e.g., whether the writing was "obscene," whether there was a "clear and present danger," or, in the context of the present case, whether there was "actual malice"), then we see no rational stopping point short of holding that all factual issues in a First Amendment case are for the court. To embrace that kind of *de novo* review, as advocated by the dissent, would eviscerate the role of the jury and, in effect, vest appellate courts with original jurisdiction in libel actions.

Tavoulareas, supra, at 107-108.

(I) Independent *De Novo* Review Of Each Separate Factual Determination Would Reinforce The Sixth Circuit's Conclusions

The Court of Appeals identified eleven subsidiary or operative facts from which the jury could have based its finding of actual malice by clear and convincing evidence.¹⁰ If the Court of Appeals had wished to examine the record even more minutely, as Petitioner contends that it should have, to verify whether all of the separate and underlying facts support the verdict, the Sixth Circuit could have developed a massive compendium of facts which would have further reinforced its holding that the plaintiff had proved actual malice with convincing clarity. An exhaustive recitation of such underlying facts would represent a veritable encyclopedia of the record itself. The findings that follow are merely illustrative of what one could unearth from the record in this case:

—That prior to publication General Counsel Irwin was informed by the publisher, editorial director and the reporter that Alice Thompson's allegations were based entirely upon misinterpretations. (Record at 819, 822-823).

—That Editorial Director Blount's malicious state of mind was signaled in his October 30 column where he wrote "the unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-makers." Three days earlier, on October 27, the *Cincinnati Enquirer* had published its front-page scoop on Judge Dolan's court. At trial Blount conceded that the *Journal News* never confirmed nor even investigated this so-called rumor. (Record at 62-64).

—That the *Journal News* selectively chose which allegations to publish in an effort to hurt Dan Connaughton's candidacy and to protect Judge Dolan. For example, the

¹⁰ *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 843-844 (6th Cir. 1988).

newspaper's November 1 story failed to include Thompson's contention that Judge Dolan was present when Billy Joe New took bribes. (Record at 814).

—That the *Journal News*' November 1 story did not disclose key players in the controversy because they were known Dolan-supporters: Hank Masana, Billy Joe New's attorney who arranged the *Journal News*' interview with Thompson (Record at 70, 72) and Matt Crehan, Thompson's attorney who put her in touch with Masana. See cross examination of Blount. (Record at 629-630).

—That Dolan-supporter Masana was more than a neutral observer at the *Journal News*' October 27 interview by Blount's own admission. Blount acknowledged that Masana verbally induced Alice Thompson to make certain statements at that interview. (Record at 99-100). However, Masana's participation was not disclosed in the November 1 article.

—That on October 25 Blount privately advised Judge Dolan how to handle the negative publicity anticipated by the October 27 *Cincinnati Enquirer* exposé on his courtroom, thereby evidencing the confidential, personal relationship that existed between the two. (Record at 53-54).

—That Blount ignored the *Journal News*' internal guidelines which discourage staff members from becoming directly involved in political campaigns (Record at 616) by privately advising Judge Dolan just two weeks before the election (Record at 53-54) and by conspiring with Dolan-supporter Masana (Billy Joe New's attorney) to arrange the October 27 interview with Thompson at the Masana law offices.

—That Blount never assigned police reporter Tom Grant to verify Thompson's allegations and credibility with police officers investigating the Billy Joe New bribery case. (Record at 228-229).

—That the *Journal News*' excuses for not reaching Patsy Stephens ring false, especially for a newspaper in the business

of finding and interviewing people in a small town. (Record at 124, 242-243). Further, eight or nine reporters were assigned to this story.

—That the *Journal News* deliberately quoted out of context every explanation Connaughton gave for Thompson's false allegations. (Record at 549, 629-632).

—That reporter Pam Long failed to include in the November 1 story Connaughton's denial that he promised Ms. Thompson anonymity. (Record at 546).

—That the devastating direct quotes which appeared in the November 1 story — "in appreciation" for and "dirty tricks" — cannot be found in the transcript of Thompson's taped interview on October 27. (Record at 570-571).

—That reporter Long's indifference to contradictory information was evident even after the November 1 story was published when Long cancelled an interview requested by Stephens. Stephens wanted to expose her sister's lies (Record at 167-168), but a time was never arranged. (Record at 777-778).

—That the variance between Stephens' and Thompson's recollections could not be attributed to just a difference in interpretation (Record at 191), despite the *Journal News*' attempt to retreat behind such a justification.

—That the November 1 story implied Connaughton had to induce Stephens and Thompson to reveal Billy Joe New's corruption when in fact Stephens was anxious to meet and reveal this information and Thompson decided to accompany her sister to the September 17 all-night meeting at the Connaughton's home. (Record at 397-399).

—That cross examination of Alice Thompson (Record at 740-756) and her mother, Zella McQueen (Record at 760-762) impeached their testimony in instances too numerous to cite.

The foregoing recitation thus demonstrates that the more deeply one digs into the massive evidence underlying the

jury's finding of actual malice, the more support one discovers for that finding. Why does Harte-Hanks seek a more comprehensive review of the record when such an exercise would only bury it deeper in culpability?

(J) The Record Fully Supports The Court Of Appeals' Identification Of Eleven Subsidiary Facts On Which The Jury Could Have Based Its Finding Of Actual Malice.

Petitioner tries in vain to persuade the Court that the record does not support the Sixth Circuit's identification of eleven subsidiary facts from which the jury could have found actual malice. The following analysis demonstrates, however, that the Court of Appeals read the record correctly.

Evidence Establishing Subsidiary Fact (1):

Blount's "confidential personal relationship" with Judge Dolan was revealed (a) by Blount's private meeting with Dolan on October 25 at which he advised Dolan how to handle the negative publicity anticipated by the October 27 *Cincinnati Enquirer* exposé on Dolan's court practices. (Record at 52) and (b) by Blount's private meeting on October 19 with Hank Masana, a known Dolan-supporter and attorney for the corrupt Billy Joe New. (Record at 69). Blount and reporter Long did not interview Thompson until October 27 so as to accommodate Masana's vacation schedule. (Record at 72). Blount conceded that Masana induced Thompson to make certain statements during the October 27 interview. (Record at 99-100).

The *Journal News*' "consistently unfavorable" coverage of Connaughton and "consistently favorable" coverage of Dolan was evidenced by the rumor Blount inserted in his October 30 column (Pl's. Exh. 1) implying that the *Enquirer* published a front-page exposé on Dolan's questionable courtroom practices on October 27 because of Connaughton's alleged "wealthy, influential link to *Enquirer* decision-makers."

Blount acknowledged that this so-called rumor, or as he phrased it, "unproven suggestion" was never confirmed or even investigated. See also the Court of Appeals' discussion of the "absurdity of Blount's unfounded accusation." *Connaughton, supra*, at 834, n.3. Curiously, Blount's column never contended that the October 27 *Enquirer* scoop was untrue. Nevertheless, Blount took a swipe at Connaughton just nine days before the election based on Blount's "unproved suggestion."

Moreover, the *Journal News* reported that Dolan fired Billy Joe New while knowing that New had resigned. (Record at 813). This slant shed a more favorable light upon Dolan than the truth would have.

The *Journal News* decided not to publish allegations by Thompson that Dolan was present when Billy Joe New took bribes (Record at 814) while eagerly publishing Thompson's extremely damaging allegations against Connaughton. Dolan received the ultimate in favorable editorial coverage by winning the newspaper's endorsement two days before the election. (J. App. at 250, Def's. Exh. H).

Evidence Establishing Subsidiary Facts (2), (3) and (4):

The October 30 column by Blount (Pl's. Exh. 1) represents probative, tangible evidence of the highest quality in respect to the bitter rivalry the *Journal News* faced with the *Enquirer*. In that column Blount blasted the *Enquirer's* front-page placement of its October 27 exposé on Dolan's questionable practice of disposing of cases behind closed doors in the absence of the prosecutor.

Blount's criticism of the *Enquirer* placement of this local story ahead of world news was a deceptive stratagem to undermine the *Enquirer's* market share in the Hamilton area. It is elemental journalism that sensational local news is a tremendous draw for readership and subscribers. The *Enquirer's* placement of its exposé of the Hamilton Municipal Court was perfectly proper. The *Enquirer's* exposé was more

than an embarrassment to the *Journal News*; it was recognition that the *Journal News* missed a major story in its own backyard. Blount attempted to counteract it in his Sunday October 30 column and subsequent news articles for fear that the story would diminish the *Journal News's* circulation.

By Blount's own admission, the *Enquirer* and the *Journal News* were the newspapers with the largest circulations in the Hamilton community (Record at 59) and he grudgingly acknowledged, "We like to get a story ahead of them . . ." (Record at 60).

Still more evidence of that rivalry was the *Journal News's* decision to publish Thompson's allegations on November 1, a date the Court of Appeals correctly identified as critical to the timing of the *Journal News's* campaign to further the election of its candidate Dolan by discrediting Connaughton before the forthcoming election and thereby fortifying its reputation within its circulation area as the dominant respected and influential image-maker to the detriment of the *Enquirer*. *Connaughton, supra*, at 846.

Evidence Establishing Subsidiary Fact (5):

The transcript of the *Journal News's* interview with Alice Thompson, (Def's. Exh. J appearing on pages 279 through 321 of the Joint Appendix), is permeated with Thompson's antagonism toward Connaughton, specifically, according to her, because she was afraid people would think that ". . . I'm a rat and I'm a snitch . . ." (J. App. 304-5). Thompson claimed that Connaughton promised Stephens and her a vacation in Florida and a job (J. App. 293-4) and also assured her that her name would not be made public (J. App. 296), and that Connaughton didn't deliver on any of these promises. Thompson's antagonism towards Connaughton leaps out from the pages of Def's. Exh. J. Moreover, Connaughton told Blount and Long of a phone call he received from Thompson hysterically accusing him of betraying her when her name appeared in the paper as a grand jury witness. (J. App. 273, Def's. Exh. 2).

Evidence Establishing Subsidiary Fact (6):

Petitioner challenges the Court of Appeals' sixth finding "that the *Journal News* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition."

That finding is based in large part on Jim Blount's admissions that he knew that he was evaluating the credibility of one who had twice been convicted, once for assault and once for shoplifting, and who was rumored to have had psychiatric problems. (J. App. 35). The suggestion that the *Journal News* could have presumed Thompson credible because Connaughton based his criminal complaint on the statements of Thompson and her sister Stephens is logically improbable from the evidence, inasmuch as the record discloses that the principal testimony upon which that complaint was based came from Stephens, not Thompson (J. App. 147) and that Connaughton, (on the advice of Butler County Prosecutor John Holcomb), did not file a complaint until after Stephens passed a polygraph test arranged by Connaughton. (J. App. 153, 268).

Evidence Establishing Subsidiary Fact (7):

The seventh subsidiary fact, "that every witness interviewed by *Journal* reporters discredited Thompson's accusations," is challenged by Petitioner on the basis that "this presumed finding" ignores Connaughton's own "confirmation" during an October 31 interview.

The argument that Connaughton "confirmed" Thompson's statements, which is the linchpin of Harte-Hanks' defense, is based upon an egregious distortion of the record. As discussed *supra* at length, Connaughton not only did not "confirm" Thompson's charges, but, to the contrary, unqualifiedly and vehemently denied them during his discussion with Blount and Long on October 31, 1983 (J. App. 262-267, Def's Exh. I) and again at trial. (J. App. 119-123).

Evidence Establishing Subsidiary Fact (8):

Petitioner challenges the Court of Appeals' eighth finding that "the *Journal* intentionally avoided interviewing Stephens . . ." and maintains instead that the *Journal News*' failure to interview Stephens was not intentional. That issue is discussed at length *supra* under the subheading "(b) In Re Patsy Stephens." The record begs for the inference that the *Journal News* intentionally avoided interviewing Patsy Stephens in order to circumvent an obstacle to publishing Thompson's statements.

Evidence Establishing Subsidiary Fact (9):

Contrary to what Petitioner seems to be contending, the jury doubtless did find it to be uncontroverted that the *Journal News* knew that Thompson's allegation would discredit and damage Connaughton. See discussion of the proof of the defamatory nature of the article that appears *supra* under the heading "(C) The Plaintiff Proved By Clear And Convincing Evidence That The Article Was Defamatory." Both Cocozzo and Irwin admitted that they knew that the article would damage Connaughton. (J. App. at 95-96, 193).

Harte-Hanks also erred in criticizing the Sixth Circuit's finding in this regard as legally irrelevant. This Court stated in *Curtis Publishing Company v. Butts, supra*, at 170, that a publisher's knowledge of the harm that is likely to follow publication of a story is relevant to whether it was published with actual malice.

Evidence Establishing Subsidiary Fact (10):

The inference that the prepublication legal review was a sham may reasonably be drawn from a number of facts: (a) that Publisher Cocozzo was so convinced that the article as written had the potential to harm Connaughton that he arranged a prepublication conference with counsel and yet gave the green light to publish despite not having his misgivings

resolved; (b) that Irwin, after being advised by the others that Thompson's charges were the result of her misinterpretation of what she had heard, nonetheless advised his client that the newspaper had the legal right to publish the article; (c) that Walker and Cocozzo both believed that Stephens should have been interviewed before the article was published but failed to hold up publication until the *Journal News* could interview her; and (d) that Harte-Hanks made a particular point of trying to convince the jury that the decision to obtain the advice of the *Journal News*' very learned lawyer before publishing the article demonstrated the newspaper's good faith. Therein lies the ultimate sham. In fact the advice Irwin gave to publish the article bordered on legal malpractice. Judge Rubin advised the jury that the advice of counsel is not a defense to libel. (Record at 797). If it were, the worst advice would be the best defense for the most outrageous defamation.

Evidence Supporting Subsidiary Fact (11):

Finally, there is substantial evidence in the record that the *Journal News* "timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*." The Court of Appeals correctly identified the most obvious examples of the *Journal News*' invidious timing. Although Blount assembled a team of reporters on Friday, October 28, to interview each of the persons who had been present at the various meetings attended by Stephens and Thompson, Blount decided at the meeting that the assigned interviews were not to begin until the following Monday which was October 31, the day after he published his vituperative Sunday column, "Editors' Notebook." (J. App. 207, Plf's. Exh. 1). Blount's October 30 column was carefully contrived and designed to condition the public to the Thompson charges which were to be published two days later on November 1. The *Journal News* endorsed

Dolan two days before the election. (J. App. 250, Def's. Exh. H).

Drawing the parallel between the facts of *Curtis, supra*, and this case, the Court of Appeals appropriately concluded by the record:

Publication could have been withheld until a later date to accommodate a thorough investigation of credibility implications of the magnitude presented by Thompson's accusations which were of conspicuous concern to Cocozzo, the publisher, Blount, the editorial director, and Walker, the editor of the *Journal*, unless of course the November 1st publication date was crucial to the timing of the *Journal's* campaign to further the election of its candidate Dolan by discrediting Connaughton before the forthcoming election and thereby fortifying its reputation within its circulation area as the dominant respected and influential image maker to the detriment of the *Enquirer*.

Connaughton, supra, at 846.

(K) It Is Difficult To Square The *Bose* Rule With The Seventh Amendment.

It is established law that libel cases belong to that species of lawsuits which carry the right to trial by jury. *Ross v. Bernard*, 396 U.S. 733, 735 (1970). Justice Black believed that second-guessing a jury's findings and credibility assessment is exactly what the Seventh Amendment forbids. *Curtis Publishing Company v. Butts*, 388 U.S. 130, 171 (1967).

In formulating the *New York Times* rule, this Court endeavored to circumvent the Seventh Amendment by stating that it does not preclude the Court from determining whether federal law has been properly applied to the facts. *New York Times, supra*, at 709-710, n. 26. Somehow, that does not quite dispose of the matter.

The free press guarantee has no greater weight than any other guarantee embodied in the Bill of Rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 561 (1976). Thus, the First Amendment should not be construed so as to diminish the force of the Seventh Amendment.

In reality, pretending that the Seventh Amendment is not an obstacle to independent *de novo* review is a good deal like pretending that the elephant sitting in the living room doesn't exist.

CONCLUSION

A critical survey of this massive record of direct and circumstantial evidence of the *Journal News*' serious doubts as to the truth of Alice Thompson's accusations, resolving all reasonable inferences from the evidence, including assessments of credibility,¹¹ in favor of Connaughton, *Connaughton v. Harte-Hanks*, 842 F.2d 825, 845 (1988), *Tavoulareas*, panel opinion, *supra*, at 109, would impel the conclusion that the Sixth Circuit's judgment of affirmance was inexorably correct. As we have shown, that judgment would actually be reinforced by an evaluation of each underlying issue of fact. Would Harte-Hanks wish a remand to the Court of Appeals only to lose again?

¹¹ "... findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context.", *Bose*, at 515, Rehnquist, J., dissenting.

However, Petitioner's plea for appellate review of each separate, underlying factual issue must be rejected because, . . . "that kind of *de novo* appellate review . . . would eviscerate the role of the jury and . . . vest appellate courts with original jurisdiction in libel actions." *Tavoulareas*, *supra*, at 108, and it would violate the Seventh Amendment rights. "The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 174 (1967), Brennan, J., concurring.

Beyond that, this paradigm case perfectly illustrates the aptness of Chief Justice Rehnquist's contention that the *Bose* requirement of *de novo* appellate review is practically infeasible. Constitutional theory aside, the task of second-guessing a jury verdict is virtually impossible in a case such as this where liability is subjective rather than objective, where the issue is what Jim Blount, Pam Long, Bob Walker, Joe Cocozzo and James Irwin actually believed when they decided to publish Alice Thompson's charges. "A determination as to the actual subjective state of mind [of those particular people at that particular time]" is thus a far more tenuous exercise for an appellate court than deciding whether material appeals to prurient interests. *Bose*, *supra*, at 518, n. 1.

Seen in this light, the independent appellate review requirement which this Court has specially tailored for public figure libel cases, constitutionally troublesome and practically infeasible in itself, is doubly flawed, coupled as it is with the culpability test this Court has also specially tailored for such cases.

In conclusion, we respectfully submit that for the multitude of reasons stated hereinabove this honorable Court should affirm the Sixth Circuit's judgment. We also express the hope that the Court will either discard the requirement of

independent appellate review or at least clearly limit it to the determination of the ultimate fact.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,

v.

Petitioner,

DANIEL CONNAUGHTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**REPLY BRIEF OF PETITIONER
HARTE-HANKS COMMUNICATIONS, INC.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-10

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**REPLY BRIEF OF PETITIONER
HARTE-HANKS COMMUNICATIONS, INC.**

Petitioner Harte-Hanks Communications, Inc.,* publisher of the Hamilton, Ohio *Journal News* (collectively the "*Journal News*"), respectfully submits this Reply Brief in response to the Brief of Respondent Daniel Connaughton. As the following discussion demonstrates, Connaughton has failed to confront either the undisputed record evidence or the well-settled principles of constitutional law that mandate reversal of the judgment below.

* The corporate listing statement required by S. Ct. R. 28.1 and included in the Brief of Petitioner remains currently accurate and reference is made thereto.

I. THE JUDGMENT BELOW CANNOT BE AFFIRMED UNDER ANY STANDARD OF APPELLATE REVIEW.

Respondent Daniel Connaughton's brief in this Court is remarkable largely for what it omits—any serious discussion of Connaughton's prepublication, tape-recorded interview with the *Journal News*—and for what it relies upon—a demonstrably incorrect construction of one sentence wrenched from the deposition testimony of the newspaper's attorney. Connaughton's inability even to address the undisputed evidence that, prior to publication, he "confirmed the factual basis" of the article at issue, App. 58a (Guy, J., dissenting),¹ belies his claim that the record contains "clear and convincing" evidence of "actual malice."²

Like the Court of Appeals majority, Connaughton both dismisses his prepublication statements to the *Journal News* as "speculation" and avoids any reference to the text of the tape-recorded interview in which he made them. Brief of Respondent, at 33.³ Yet, this evidence of

¹ References to the Joint Appendix are denoted as "J.A."; references to the trial record are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "App.".

² In its opening brief, the *Journal News* sets out a detailed rendition of the trial record, based upon both (1) the undisputed evidence and (2) the resolution of conflicting testimony in favor of the jury's verdict. See Brief of Petitioner, at 1-12. Moreover, the *Journal News' Statement of the Case* contains explicit references to those portions of the trial record on which it is based. Connaughton, in contrast, provides this Court with a manufactured account that is, not surprisingly, largely bereft of references to the record. See Brief of Respondent, at 1-2, 20-30.

³ Similarly, Connaughton's brief declines to address a host of other undisputed evidence, including (1) his post-publication press conference at which he again confirmed the factual bases of the article at issue, see J.A. 245, (2) his wife's independent confirmation of material portions of the article, see J.A. 98, 116, and (3) prosecu-

Connaughton's own statements, which requires no resolution of conflicting testimony or weighing of witness credibility, demonstrates beyond peradventure that the *Journal News* had ample reason to conclude that Alice Thompson's allegations had a substantial basis in fact. Although the *Journal News* could not "conclusively determine whether Ms. Thompson was justified in construing the plaintiff's statements as 'promises,'" App. 58a (Guy, J., dissenting), Connaughton's prepublication admissions surely preclude a finding that the *Journal News* reported Thompson's statements with the requisite "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

In contrast to this undisputed evidence, the self-styled "direct" proof of "actual malice" marshalled by Connaughton is attorney James Irwin's "remarkable concession" that the *Journal News'* "editorial decision-makers told him that Thompson simply misinterpreted what Connaughton said to her." Brief of Respondent, at 9, 12, 19. Irwin's *actual* testimony on this point speaks for itself:

Q. What if anything was the most important factor in your rendering the advice that you did to the *Journal News*?

A. That Alice Thompson's claims seemed to make sense and that Dan Connaughton's interview confirmed all those basic facts, leaving only a question of interpretation for the readers of the article.

* * * *

Q. [At your deposition, did] I ask you this? "You weren't told at that time that Dan Connaughton flat denied he made any offers or inducements to either one of those women?" I asked you that question, didn't I?

A. I have no distinct recollection, but it's here and I'm sure you did.

tor John Holcomb's endorsement to the *Journal News* of Alice Thompson's credibility prior to publication, see J.A. 47, 146-47.

Q. Did you give this answer? "I was told as we went over this line-by-line that Dan Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips."

A. Yes sir.

* * *

[A.] "This young lady, as I was given to believe, is just barely hanging on the economic margin of society, being driven up to [his] home in his Mercedes or his Buick to a hundred thousand dollar plus home, she said he talked to her about these things. She thought he was offering her something. He confirmed all that. He said, quote, she misinterpreted it, close quote."

J.A. 192, 196-98. At worst, Irwin's "remarkable concession" that he "was told . . . Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips," J.A. 196, demonstrates an incorrect choice of grammar. It does not, as Connaughton would contend, divulge "the *Journal News*' admitted prepublication belief that Thompson simply misinterpreted what Connaughton said to her." Brief of Respondent, at 15.

The "actual malice" standard is designed to ensure constitutional protection for all expression about candidates for public office, save only the calculated falsehood. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Because it cannot be disputed that, prior to publication, Connaughton himself confirmed the factual bases of the article at issue, a finding of "actual malice" cannot be affirmed under *any* standard of appellate review, much less the searching, *de novo* review demanded by the First Amendment.

II. INDEPENDENT REVIEW BY APPELLATE COURTS IS NEITHER "PRACTICALLY INFEASIBLE" NOR "CONSTITUTIONALLY TROUBLESOME."

As his principal legal argument, Connaughton asks this Court either to "abandon" the requirement of independent appellate review altogether or to restrict it to the so-called "ultimate" finding of "actual malice" identified by the Court of Appeals. Brief of Respondent, at 4. According to Connaughton, independent review, at least as "expanded" in *Bose Corp. v. Consumers Union*, is both "practically infeasible," because it requires appellate courts to make findings about the "'mens rea of an author,'" and "constitutionally troublesome," because it "eviscerate[s] the role of the jury" in violation of the Seventh Amendment. Brief of Respondent, at 4, 5, 7 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 515 (1984) (Rehnquist, J., dissenting)). Neither contention survives analysis.

Initially, Connaughton incorrectly suggests that independent review is a recent invention, mentioned only in passing in *New York Times*, and somehow "expanded" to impractical and unconstitutional dimensions in *Bose*. Brief of Respondent, at 4. To the contrary, the doctrine of independent review, especially in the First Amendment context, enjoys a long and venerable history, dating at least from this Court's 1927 decision in *Fiske v. Kansas*, 274 U.S. 380 (1927), only two years following the "incorporation" of the First Amendment into the Fourteenth in *Gitlow v. New York*, 268 U.S. 652 (1925). Independent review has been a fixture of this Court's First Amendment jurisprudence since that time whenever an appellate court is called upon to determine cases of "alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legiti-

mately be regulated.' " *New York Times Co. v. Sullivan*, 376 U.S. at 285 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).⁴

For more than sixty years, the doctrine of independent review has required that appellate courts undertake a *de novo* analysis of material facts to determine, *inter alia*, whether allegedly obscene expression appeals to the "prurient interest" in a "patently offensive" way, *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974); whether a newspaper editorial creates "a clear and present danger" to the administration of justice, *Pennkamp v. Florida*, 328 U.S. 331, 347 (1946); or whether a speaker's pronouncements, under the circumstances, threaten to disturb the peace, *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). This Court's decisions with respect to all these inquiries, as well as the search for calculated falsehood demanded by *New York Times* and *Bose*, have long been premised on the constitutional "obligation" of judges "to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and, in doing so . . . mak[e] an independent constitutional judgment on the facts of the case." *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).⁵

⁴ See Brief of Petitioner, at 21 n.29 (citing cases); *Bose Corp. v. Consumers Union*, 466 U.S. at 505 (Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited").

⁵ In *New York Times*, no less than in *Bose*, this Court undertook a searching, *de novo* review of the whole record to determine whether the plaintiff had proven "actual malice" with "convincing clarity." 376 U.S. at 285-86; see *Bose Corp. v. Consumers Union*, 466 U.S. at 518 n.2 (Rehnquist, J., dissenting) ("[I]n *New York Times* . . . we conducted independent appellate review of the facts

The independent review of the record undertaken by this Court in *New York Times* and *Bose* is no more difficult or less necessary than that routinely required in other First Amendment cases. As the *Journal News'* opening brief demonstrates, it is not only a "feasible," but a relatively unimposing, exercise for an appellate court to review the trial evidence, identify the undisputed material facts, resolve disputed issues of material fact in favor of the jury's verdict, and determine, by invoking its independent judgment, whether that record contains clear and convincing proof of "actual malice." See Brief of Petitioner, at 2-12. Although the search for calculated falsehood concededly speaks in part to the *mens rea* of the defendant, see *Bose Corp. v. Consumers Union*, 466 U.S. at 515 (Rehnquist, J., dissenting), the evidence surrounding that determination is largely circumstantial, see *Herbert v. Lando*, 441 U.S. 153, 170 (1979), and no different from that routinely considered by appellate courts when undertaking independent review in a variety of other contexts, see, e.g., *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (Court required to determine whether confession was "voluntary"); *Baumgartner v. United States*, 322 U.S. 665, 666 (1944) (Court required to ascertain whether citizen subjectively

underlying the 'actual malice' determination."). As this Court reaffirmed in *New York Times*, when the issue for decision is whether particular expression is protected by the First Amendment, appellate judges must "'examine . . . the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" 376 U.S. at 285 (quoting *Pennkamp v. Florida*, 328 U.S. at 331). Although that inquiry may involve the consideration of specific facts, the Court in *New York Times* recognized that the Constitution empowers appellate judges to "'review the finding of facts . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" 376 U.S. at 285 n.26 (quoting *Fiske v. Kansas*, 274 U.S. at 385-86).

renounced allegiance to Germany).⁶ Most importantly, however, the “actual malice” determination calls upon appellate courts to make a uniquely *judicial* decision—whether the expression at issue has forfeited its claim to constitutional protection. That a court must examine the trial record in making that judgment does not dilute its essentially constitutional, and hence judicial, character.⁷

⁶ As Justice Black noted in articulating the constitutional necessity of independent review:

“That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. . . . [I]t is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made.”

Feiner v. New York, 340 U.S. 315, 322 n.4 (1951) (Black, J., dissenting) (quoting *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935)).

⁷ See *Bose Corp. v. Consumers Union*, 466 U.S. at 506 n.25 (“actual malice” determination “involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind”) (quoting *Roth v. United States*, 354 U.S. 476, 498 (1957)) (emphasis in original). Connaughton’s suggestion that limiting independent review to the so-called “ultimate” finding of “actual malice” somehow renders such review more “practically feasible,” Brief of Respondent, at 5, makes no sense. The exercise in “ritualistic inference granting,” *Tavoulareas v. Piro*, 759 F.2d 90, 147 (Wright, J., dissenting in part), *vacated en banc*, 763 F.2d 1472 (D.C. Cir. 1985), mandated by such an analysis is no less time-consuming or more manageable than the *de novo* review envisioned by *New York Times* and *Bose*. Indeed, by requiring appellate courts to ignore even undisputed evidence supporting the defendant and by compelling them to draw all conceivable inferences favoring the plaintiff, the notion of independent review embraced by Connaughton and the Court of Appeals is, ultimately, a charade that results in a finding of “actual malice” in every case. Where, as in adjudicating the “actual malice” issue, “the relevant legal principle can be given meaning only through its application to the particular circumstances of a case,” this Court has repeatedly indicated that it cannot “give the trier of fact’s conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.” *Miller v. Fenton*, 474 U.S. at 114.

Accordingly, in *New York Times* and again in *Bose*, this Court has rejected the suggestion that independent appellate review somehow “eviscerate[s] the role of the jury,” Brief of Respondent, at 5, in contravention of the Seventh Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26; *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. Independent review extends only to the constitutionally derived “actual malice” determination and does not contemplate *de novo* appellate scrutiny of the myriad of other issues typically submitted to a jury in defamation litigation. See *id.* at 514 n.31. Indeed, by requiring appellate courts to resolve disputed issues of material fact in favor of a jury’s finding of “actual malice,” the doctrine of independent review both respects the jury’s salutary role in assessing witness credibility and preserves the distinct duty of appellate courts to determine “whether governing rules of federal law have been properly applied to the facts.” *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26.⁸

⁸ By its own terms, the Seventh Amendment speaks to the historical tradition manifested in the common law and its modern analogues. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 449 (1977); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-40 (1979) (Rehnquist, J., dissenting) (“[T]he scope and effect of the Seventh Amendment, . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted.”). “Actual malice,” by contrast, is a creature of constitutional origin that simply has no ancestor at common law, where the Crown retained unbridled power to punish seditious libel and its courts were not called upon to safeguard criticism of public officials, much less candidates for public office. See Lovell, *The “Reception” of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1059 (1962). Indeed, the common law courts continued the view of the Star Chamber that all criticism of government and public officials was necessarily false, and the sanctions for publishing libelous falsehood were almost exclusively criminal. See *id.* at 1059-61. The jury had no role to play at all until the passage of Fox’s Libel Act,

This Court has long recognized that the line separating protected from unprotected expression is a more difficult, "sensitive" line to draw than that separating, as in typical civil litigation, permissible from impermissible conduct. *Speiser v. Randall*, 357 U.S. at 525. Thus, *New York Times* proceeds from the premise that, while juries may be perfectly capable of distinguishing negligent from responsible driving, the First Amendment simply does not trust them to distinguish protected from unprotected expression.⁹ Such issues of constitutional line-drawing are "inherently unsuited to accurate resolution by a jury," *Ollman v. Evans*, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*,

32 Geo. 3, c. 60 (1792), one year after the Seventh Amendment was ratified, in an effort to protect free political expression. *Id.* Under Fox's Libel Act, the jury's role was essentially a "right to acquit" in criminal cases and the common law courts retained the acknowledged and widely championed power to override a jury's judgment of conviction. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 328 (1966). It is "murky logic indeed that would derive from a one-sided rule in the application of criminal sanctions an uncontrolled right to find for either side in civil cases" grounded in the Seventh Amendment. *Id.* at 327. The "central meaning" of the First Amendment identified in *New York Times*—i.e., the unconstitutionality of the law of seditious libel itself—is stood on its head when Fox's Libel Act, Britain's own modest effort to safeguard political expression, and the Seventh Amendment are invoked by a would-be public official to bar meaningful judicial review of a jury finding that penalizes criticism of his conduct.

⁹ See *Bose Corp. v. Consumers Union*, 466 U.S. at 501 n.17 ("stakes" involved in the "actual malice" determination—"in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact"); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts").

471 U.S. 1127 (1985), and must ultimately be subject to appellate scrutiny.

In the last analysis, therefore, Connaughton's legal arguments fail because they attempt to separate two inextricably linked and mutually dependent safeguards of constitutional magnitude—the "actual malice" standard and the rule of independent appellate review. Independent review represents no more than a reflection of the constitutional principle that, in the First Amendment context, "[t]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. at 520 (emphasis added). The efficacy of the "actual malice" standard depends on the ultimate power of appellate judges to apply it in specific cases and thereby to define that category of expression beyond the scope of constitutional protection. Absent independent appellate review, "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding inherent in all litigation will create the danger that legitimate utterance will be penalized," *id.* at 526, a danger the First Amendment cannot tolerate.

III. CONNAUGHTON MISCONSTRUES THE "ACTUAL MALICE" STANDARD AND MISAPPLIES IT TO THE RECORD EVIDENCE.

Connaughton's rejection of the doctrine of independent review is particularly troublesome when coupled with his erroneous explication of the "actual malice" standard itself. Indeed, by rejecting this Court's repeated admonitions that the "actual malice" standard is not designed to root out and punish instances of journalistic malpractice, but rather to identify that narrow category of libelous falsehood beyond the scope of First Amendment protection, Connaughton also misapplies the constitutionally mandated standard to the record evidence.

A. Connaughton Misconstrues the "Actual Malice" Standard.

Like the Court of Appeals, Connaughton erroneously equates "actual malice" with the journalistic malpractice standard advocated by a plurality of this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), but rejected by the Court's majority in that very case and consistently thereafter, see Brief of Petitioner, at 24 n.32; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974). Connaughton equates "'highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers'" with "actual malice," Brief of Respondent, at 31-32 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. at 158), chides the *Journal News* for not following "good practice[s]," Brief of Respondent, at 25, and purports to instruct the newspaper regarding the dictates of "responsible journalism," *id.*, at 26. Connaughton's views regarding "good" or "responsible" journalism are, however, constitutionally irrelevant to this proceeding.

Courts "do not sit, even in reviewing a libel verdict, as some kind of journalism review seminar, offering [their] observations on contemporary journalism and journalists." *Tavoulareas v. Piro*, 759 F.2d at 145 (Wright, J., dissenting in part). As this Court has repeatedly emphasized, "actual malice" "is not measured by whether a reasonably prudent man would have published." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); accord *Gertz v. Robert Welch, Inc.*, 418 U.S. at 334 n.6. Rather, the plaintiff must demonstrate that the defendant published despite a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

The application of a journalistic malpractice standard is particularly inappropriate in this case, which involves expression at the core of the First Amendment. The

"application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech and of the press." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). Indeed, "[a] community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it." *Id.*

Connaughton's erroneous construction of the "actual malice" standard infects his entire analysis of the record evidence. Most significantly, Connaughton contends that the record contains "direct evidence of actual malice" because (1) *Journal News* reporter Pam "Long simply did not know whether or not Thompson's accusations against Connaughton were true when she wrote the story," and (2) Editorial Director Jim Blount "conceded . . . that 'there is no judgment on our part as to who was telling the truth.'" Brief of Respondent, at 19 (quoting R. 638). According to Connaughton, these "admissions were made in unguarded candor" and thus "should be given extraordinary weight." *Id.*

That Connaughton not only credits, but seeks to emphasize this undisputed testimony demonstrates his fundamental misconception of the applicable law. The "actual malice" standard requires "clear and convincing" proof that "the defendant *in fact* entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. at 731 (emphasis added); see *Garrison v. Louisiana*, 379 U.S. at 75 (only "calculated falsehood" beyond scope of First Amendment protection). "Actual malice" is knowing or believing that a defamatory statement is probably false; its refutation does not require an affirmative belief that such expression is true. Since Connaughton concedes that the *Journal News* "simply did not know" whether Thompson's charges were true or false, Brief of Respondent, at 19, it cannot be found to have published them with a "high degree of awareness of

their probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

If Connaughton's views regarding the contours of "actual malice" were accepted, much news reporting about political campaigns heretofore presumed to be constitutionally protected would be subject to civil penalties. In the instant case, the electorate was entitled to be informed about Thompson's statements concerning the genesis of her impending grand jury testimony against Connaughton's opponent, especially after Connaughton confirmed their factual bases. As this Court has recognized, "a vast amount of what is published in the daily . . . press purports to be descriptive of what somebody *said* rather than of what anybody *did*." *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971) (emphasis in original). If a newspaper is compelled to warrant the accuracy of otherwise newsworthy statements made in the course of a highly charged campaign for public office, it will "'steer far wider of the unlawful zone,'" and the voters will be deprived of much information "because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co. v. Sullivan*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526).

B. Connaughton's Analysis Distorts Both the Record Evidence and Its Legal Significance.

Connaughton's discussion of the "actual malice" issue is not restricted to a misconstruction of the substantive standard itself. By supplementing the actual trial record with nonexistent "evidence" and by crediting insupportable inferences from that manufactured record, Connaughton also distorts the legal significance of even those "findings" that he presumes the jury "could have" made. App. 35a-36a.

According to Connaughton, the trial record "overflow[s]" with "circumstantial" proof of "actual malice," Brief of Respondent, at 8, 20, including, *inter alia*, "evidence" that:

- the *Journal News* "consciously avoided pursuing clearly available means of making absolutely certain that Thompson's statements were false," *id.*, at 2, such as reviewing the tape recordings of the September 17 meeting at Connaughton's home, interviewing Patsy Stephens, and confirming Thompson's credibility with Hamilton police, *id.*, at 24-29;
- the *Journal News* was aware that Thompson "had a history of psychiatric illness," had been convicted of "a crime of deception," and had "an admitted motive to fabricate," *id.*, at 2; and
- the *Journal News* had a "confidential personal relationship" with Judge Dolan and a vendetta against the *Cincinnati Enquirer* that led it to publish the article at issue to "reestablish" itself "as the dominant news force in Hamilton politics" and to "revive" Judge Dolan's "sagging campaign," *id.*, at 2, 41.

Neither the record nor the applicable law supports Connaughton's assertions.

The undisputed evidence reveals, for example, that the tape recordings of the September 17 meeting are of dubious, if any, relevance because they *omit* nearly two hours of that all-night session; in any event, Connaughton and his wife had *several* additional meetings and conversations with Thompson prior to either her interview with the *Journal News* or her grand jury testimony. See J.A. 114-15, 134, 165; R. 184-85, 352, 448-49, 454.¹⁰ Moreover,

¹⁰ Connaughton similarly distorts the record with respect to the *Journal News*' efforts to contact Stephens. For example, Connaughton notes that, following publication of the article at issue, "Long cancelled an interview requested by Stephens." Brief of Respondent, at 40. It is undisputed, however, that Long cancelled the interview because she had to pick up her daughter, who was ill, from school; that Stephens then refused to reschedule the interview; and that Stephens promised to telephone Long the following day but never did so. R. 777. Moreover, Stephens' actual testimony con-

the record contains undisputed evidence that Blount verified Thompson's credibility both with local police and with Hamilton prosecutor John Holcomb prior to publication, and that both Holcomb and Officer James Schmitz confirmed these views about Thompson at trial. J.A. 38, 47, 146-47, 185-86.¹¹

The record further reveals that Thompson's "crime of deception" was a misdemeanor shoplifting violation and that the only mention of Thompson's purported "history of psychiatric illness" prior to publication was Connaughton's own suggestion that she may have been to a local psychiatric hospital, an assertion he concededly could not "back . . . up." J.A. 190, 273, 277.¹² Similarly, Connaught-

firmed that Connaughton *did* discuss with her and Thompson the subjects of jobs, anonymity, a vacation trip, and his plans to confront Judge Dolan. J.A. 326; R. 180-81, 186-89, 790.

¹¹ Despite this undisputed evidence, Connaughton nevertheless asserts that "Blount told two diametrically opposite stories" in his deposition and trial testimony about his efforts to confirm Thompson's credibility. Brief of Respondent, at 28. To the contrary, in his deposition and again at trial, Blount testified that he directed reporter Tom Grant to verify with Hamilton police that Thompson informed them of her allegations, but that Grant was unable to do so. J.A. 37-39. Even if the jury believed that Blount had "dissembled" about his conversations with Grant, Brief of Respondent, at 29, such a conclusion cannot support an inference of "actual malice" on this record. See *Bose Corp. v. Consumers Union*, 466 U.S. at 498, 512 ("Even though the District Court found it impossible to believe that [the author]—at the time of trial—was truthfully maintaining" that "the word 'about' meant 'across,'" such testimony merely displays the author's "capacity for rationalization;" it "does not establish that he realized the inaccuracy at the time of publication.").

¹² Ultimately, Connaughton's evidence that Thompson had an "admitted motive to fabricate" can be reduced to her statement that she did not want to be viewed as a "snitch" for talking to Connaughton in the first place. Brief of Respondent, at 2. As Connaughton himself concedes, however, it is difficult to understand why Thompson would believe that it would improve her "reputation to have people think she had made these statements in return for a consideration." *Id.*, at 21.

ton's assertion that Blount had a "confidential personal relationship" with Judge Dolan is based on one, unremarkable meeting between the newspaper's editorial director and a political candidate, and is rebutted by the uncontradicted testimony of both Blount and Judge Dolan. J.A. 18, 205; R. 53-54, 582.¹³ Finally, Connaughton's "evidence" of the *Journal News*' "deceptive strategy to undermine the *Enquirer's* market share in the Hamilton area," Brief of Respondent, at 42, consists solely of Blount's published observations in a single column concerning the *Enquirer's* placement of an article about Judge Dolan¹⁴ and his innocuous "admission" that the two newspapers compete for news, *id.*, at 42-43.¹⁵

¹³ A review of the trial testimony concerning Blount's session with Judge Dolan simply reveals no evidence either that Blount "advised Dolan how to handle . . . negative publicity," Brief of Respondent, at 41, or that "Dolan told Blount that the *Cincinnati Enquirer* had been investigating claims that [Billy New] had been accepting bribes for fixing cases" and that this "inquiry was beginning to focus on Dolan directly," *id.*, at 20. In fact, the *Enquirer's* investigation and subsequent article focused on an entirely different issue, Judge Dolan's allegedly unconstitutional disposition of criminal cases in chambers. J.A. 212; R. 53-55.

¹⁴ Like the Court of Appeals majority, Connaughton belabors one reference in Blount's October 31 column to an "unproven suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-makers." J.A. 210 (emphasis added). It is, however, undisputed that such a rumor, which Blount expressly identified as unproven in his column, was circulating widely in the community, J.A. 22-25, a fact that was necessarily relevant to Blount's discussion of public reaction, whether valid or not, to the increasing bitterness of the Connaughton-Dolan campaign.

¹⁵ Although Connaughton, like the Court of Appeals, devotes precious little discussion to the actual text of the article at issue, he does assert that "the devastating direct quotes which appeared in the November 1 story—'in appreciation' for and 'dirty tricks'—cannot be found in the transcript of Thompson's taped interview on October 27." Brief of Respondent, at 40. It is, however, undisputed that every person present at her October 27 interview with the

From this "evidence," both real and manufactured, Connaughton suggests that a reviewing court is obligated to draw the inference that the *Journal News* published the article at issue with "actual malice." Yet, this Court has repeatedly emphasized not only that failure "to make a prior investigation" cannot constitute "proof sufficient to present a jury question" in a case governed by the "actual malice" standard, *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (per curiam); accord *St. Amant v. Thompson*, 390 U.S. at 730, but also that even an acknowledged bias, "bad motive," or "intent to inflict harm" is, at best, only tenuously probative of "actual malice," *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 881 (1988); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam). In the instant case, the chain of inferences from this already tenuous evidence that would be necessary to sustain the jury's finding of "actual malice" is convincingly broken by one piece of evidence that cannot be controverted—Connaughton's tape-recorded concessions that the subjects of jobs, trips, anonymity, and vacations, as well as his plan to confront Judge Dolan, were discussed by the Connaughtons with Thompson.

This undisputed evidence precludes any suggestion that the record contains "clear and convincing" proof of "actual malice." Even if Connaughton's "circumstantial" evidence were otherwise probative of "actual malice," it

Journal News, including Thompson herself, testified at trial that she used the term "dirty tricks" prior to the tape-recorded portion of the conversation. J.A. 157, 162-63; R. 554-55, 596-97, 674, 729. Even during the recorded portion of the interview, Thompson used the words "dirty" and "tricked" in describing Connaughton's conduct. J.A. 280, 314. Moreover, the terms "dirty tricks" and "in appreciation" are certainly fair characterizations of Thompson's specific allegations. J.A. 162; see *Time, Inc. v. Pape*, 401 U.S. at 289-90.

must give way to the far more plausible inferences that, *inter alia*, (1) the *Journal News* deemed it manifestly unnecessary to listen to the tapes of portions of the September 17 meeting or to seek further confirmation of Thompson's statements from Stephens once Connaughton admitted their factual bases, and (2) any questions about Thompson's credibility or motives were rendered irrelevant by Connaughton's own statements.¹⁶ Thus, the *only* reasonable conclusion that can be drawn from the record is that the *Journal News* published the article at issue without the requisite "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

¹⁶ See *St. Amant v. Thompson*, 390 U.S. at 733 (reliance on source with obvious bias does not demonstrate "actual malice" when defendant "verified other aspects" of the source's allegations).

CONCLUSION

An independent review of the trial record inevitably requires a finding that the expression at issue is protected by the First Amendment. Indeed, the *Journal News* was simply "performing its wholly legitimate function as a community newspaper when it published full reports" of both Thompson's charges and Connaughton's responses, both of which bore directly upon his qualifications for the public office he sought. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). Accordingly, the *Journal News* respectfully requests that the judgment below be reversed and that the case be dismissed.

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OCTOBER TERM, 1988

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v.

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF AMICI CURIAE OF
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-10

HARTE HANKS COMMUNICATIONS, INC.,
v. *Petitioner,*

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**BRIEF AMICI CURIAE OF
ASSOCIATED PRESS, CABLE NEWS NETWORK, INC.,
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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of twenty-nine amici curiae who include broadcasters, telecasters, journalists, editors, publishers of newspapers and magazines, and associations representing them.* Together, they comprise a broad cross-section of the news media in this country. The amici are more fully described in the Appendix to this brief.

Because the amici, or their members, operate under a constant threat of libel claims, they rely on appellate courts to review independently trial court and jury determinations of actual malice. This independent review is a fundamental part of First Amendment protection. The court below refused to discharge its constitutional duty to review the record independently, disregarding and ultimately misconstruing the meaning of that standard of review.

These amici have a profound interest in this case because they, or those they represent, frequently publish or broadcast news articles and editorials about election campaigns and regularly endorse political candidates. This Court has consistently held that such political speech is entitled to the most exacting degree of First Amendment protection. The ruling of the court below, however, punishes such speech and if not reversed will severely limit comment on political figures and related political issues. The amici, therefore, request that this Court reverse the ruling below and reaffirm fundamental substantive and procedural protection for speech.

SUMMARY OF ARGUMENT

The decision below undermines established First Amendment protections in a case that highlights the importance of those protections for speech about a political campaign and candidates. It disregards the requirement

* Written consent of both parties has been filed with the Clerk of Court pursuant to Rule 36 of the Court.

that appellate courts must engage in *de novo* review of the trial record in order to protect freedom of speech and to ensure that a conclusion of actual malice is not reached without clear and convincing evidence on the record. Instead, the court below presumed findings that are not found on the record and that constitute an impermissible basis for upholding liability.

The court below imposed a penalty on constitutionally protected expression by basing an inference of actual malice on (1) a newspaper's endorsement of a particular political candidate and (2) its presumed competition with another newspaper in the same marketplace. If not overturned, this decision will deter members of the media and others from endorsing political candidates while at the same time speaking openly and vigorously about controversies surrounding a campaign. Such a result violates the First Amendment goal of promoting unfettered political speech. This Court should reverse the decision below and reaffirm these fundamental First Amendment protections.

ARGUMENT

I. SPEECH CONCERNING A POLITICAL CAMPAIGN IS ENTITLED TO THE MOST EXACTING DEGREE OF FIRST AMENDMENT PROTECTION.

This case arose from a newspaper's coverage of a political campaign and its commentary on the actions and qualifications of a candidate for a position on the Municipal Court Bench in Hamilton, Ohio. It illustrates, in microcosm, the nation's political process, which should receive the greatest possible public attention and scrutiny, and highlights the role of the media in both reporting and offering opinions on that process.

The First Amendment vigorously guards the sanctity of public debate on political issues. Political speech is at "the core of the First Amendment," *Brown v. Hartlage*, 456 U.S. 45, 52 (1982), and "is entitled to the most

exacting degree of First Amendment protection," *FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984).

Protection of wide-open political debate is necessary to maintain a free marketplace of ideas for democratic self-governance. It is "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); see also *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("the opportunity for free political discussion" is designed to make government "responsive to the will of the people," which is a "fundamental principle of our Constitution").

This staunch protection of political speech "is to be afforded for 'vigorous advocacy' no less than 'abstract discussion,'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), and it "includes discussions of [political] candidates," *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). It protects equally statements that inspire public confidence in its leaders and those that "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. Restrictions on even "insulting" and "outrageous" political speech cannot be tolerated. *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988). If freedom of speech is to be given any meaning, it requires that unpopular political expressions not be punished. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., joined by Brandeis, J., dissenting).

The role of the media in reporting and commenting on political issues and campaigns has a venerable tradition. Historically, a free press has fulfilled "the special and constitutionally recognized role [of] informing and educating the public, offering criticism and providing a forum for decision and debate." *First National Bank v. Bellotti*, 435 U.S. 765, 781 (1985); see also *Thornhill v.*

Alabama, 310 U.S. 88, 101-02 (1940). This traditional role includes both news reporting and editorializing. *Bellotti*, 435 U.S. at 801-02; *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

The editorial role of the media in partisan politics was even more pronounced earlier in this nation's history. Newspapers were established most often as voices of a particular political ideology or party. For example, in the Revolutionary era immediately preceding the adoption of the First Amendment, several newspapers were founded for the primary purpose of supporting or challenging the Crown. Tory newspapers included the *Royal Gazette* (a wartime publication by loyalist, Jeremy Rivington) and Thomas Fleet's *Evening Post*. "Radical" newspapers included the *Independent Advertiser*, whose editor, Samuel Adams, used its pages as a forum for pro-Revolutionary propaganda. See generally L. Levy, *Emergence of a Free Press* (1985). This promotion of partisan politics continued into the 19th century with the appearance of labor newspapers such as the *Mechanic's Free Press*, whose self-appointed function was to counteract prejudice against the laborer. Such newspapers eventually led to the formation of the first national labor organizations. E. Emery, *The Press in America*, at 113 (4th ed. 1978). In the 1830s, William Lloyd Garrison began his abolitionist publication, the *Liberator*, in opposition to the proponents and institutions of slavery. That editorial tradition was carried on in the 1850s on a far larger scale by the *New York Tribune*, whose editor, Horace Greeley, used it as a platform to promote a newly organized political party that brought Abraham Lincoln to the presidency. While Lincoln held office, the 17 New York daily newspapers were polarized according to their support or opposition for the president. See Emery, *supra*, at 166.¹

¹ Similarly, the prominent editors of the late 19th and early 20th centuries, such as Joseph Pulitzer, William Randolph Hearst, and

This case exemplifies the historical participation by the press in the political process. Two newspapers endorsed competing candidates and espoused different views of their relative qualifications. The campaign was bitterly contested and included allegations by Connaughton, the respondent, that his opponent (endorsed by the *Journal News*) was corrupt.² The *Journal News* investigated Connaughton's sources for those allegations and published those sources' statements, the challenged portions of which Connaughton himself confirmed in an interview with the *Journal News* before publication.

In upholding a jury award against the *Journal News* for \$5,000 compensatory and \$195,000 punitive damages, the court below committed two fundamental errors, both of which deprived the speech in question of the protection to which it is entitled under the First Amendment. First, the court did not independently review the factual record on the issue of actual malice. Instead, it deferred to manufactured jury findings and inferences of actual malice that appear nowhere on the record. Second, it found evidence of actual malice in constitutionally pro-

Edward Wyllis Scripps, used their expanding influence in the popular press to promote their own political ideologies. See generally E. Emery, *The Press in America*, *supra*; E. Ford & E. Emery, *Highlights in the History of the American Press* (1954); F. Mott, *American Journalism* (rev. ed. 1950).

This Court has recognized the "prominent role" of the political cartoon historically in promoting public debate about political candidates. *Hustler Magazine, Inc. v. Falwell*, 108 Sup. Ct. 876 (1988) (noting that "our political discourse would have been considerably poorer without them"). The editorial role of the press through the written or spoken word is no less prominent or necessary in the political process and is entitled to as much protection under the First Amendment. See generally McCombs, *Editorial Endorsements: A Study of Influence*, 44 *Journalism Q.* 545 (1967).

² Hereinafter, the respondent will be referred to as Connaughton and the petitioner, Harte-Hanks Communications, Inc., will be referred to by the name of its publication, the *Journal News*.

tected activities: the *Journal News*' endorsement of a political candidate and presumed competition in the news marketplace.

II. THE FIRST AMENDMENT REQUIRES INDEPENDENT APPELLATE REVIEW AS AN ESSENTIAL PROTECTION FOR SPEECH.

A. Independent Review Is Necessary to Ensure that First Amendment Protections Are Properly Applied and Maintained.

This Court has required independent appellate review of the factual record whenever a trier of fact determines that a libel defendant acted with actual malice in making statements about a public figure. *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984). That requirement is consistent with a long line of cases in which this Court has imposed the independent review standard to a variety of constitutional contexts, most of which have involved political speech. Both of these constitutional concerns, protection of speech concerning a public figure and protection of political speech, are united in this case.

1. Independent Review Has Consistently Been Required to Protect Political Speech.

That appellate courts must independently review the factual record to protect constitutional rights has long been part of this Court's jurisprudence. This Court has most often required independent review of the record to protect First Amendment rights.³ See, e.g., *Connick v.*

³ Preservation of other constitutional rights has also prompted independent review. For example, in *Norris v. Alabama*, this Court stated it would "fail of its purpose in safeguarding constitutional rights" if it did not independently review the factual record to determine whether a state had systematically excluded blacks from its juries in violation of the Fourteenth Amendment's Equal Protection Clause, 294 U.S. 587, 590 (1935). This Court has held that

Myers, 461 U.S. 138, 147-48 & n.7, 150 n.10 (1983) (whether employee's speech involved a matter of public concern in wrongful termination action); *Jenkins v. Georgia*, 418 U.S. 153, 180 (1974) (to determine if material is obscene); *Miller v. California*, 413 U.S. 15, 25 (1973) (same). The majority of these First Amendment cases have involved political speech. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 & n.50 (1982) (whether political boycott of white merchants was protected by the First Amendment); *Street v. New York*, 394 U.S. 576, 589-90 (1969) (whether disparagement of the flag was protected by the First Amendment); *Cox v. Louisiana*, 379 U.S. 536, 545-48 (1965) (whether political demonstration was protected by the First Amendment); *Pennkamp v. Florida*, 328 U.S. 331, 335 (1946) (whether two publications constituted "clear and present danger . . . to the administration of justice by the court"). In all these cases, the Court stated it was duty-bound to determine the issue only after an independent review of the factual record.

Independent appellate review is required in such cases for at least two reasons: (1) to ensure that First Amendment protection is afforded to unpopular speakers and points of view, see, e.g., *NAACP v. Claiborne*, 458 U.S. at 910-11 (even when "offensive" speech is intended to be "coercive"); *Monitor Patriot Co. v. Roy*, 401 U.S. at 277, and (2) to ensure that First Amendment principles maintain their integrity when applied to diverse factual situations by juries and trial courts, see, e.g., *Pennkamp v. Florida*, 328 U.S. at 324.

appellate courts have a "responsibility" they "cannot escape" to review the voluntariness of confessions to protect criminal Due Process rights under the Constitution. *Spano v. New York*, 360 U.S. 315, 316 (1959); *Brooks v. Florida*, 389 U.S. 413, 415 (1967); *Haynes v. Washington*, 373 U.S. 503, 522 (1963). Cf. *Rios v. United States*, 364 U.S. 253, 255 (1960) (claim of unconstitutional search and seizure requires the Court to conduct a "particularized evaluation of the conduct of the officers involved").

2. Independent Review Is Necessary to Ensure Proper Application of the Actual Malice Standard in Defamation Cases.

In *New York Times*, 376 U.S. 254, this Court first announced that the First Amendment requires public officials to prove actual malice by clear and convincing evidence. The Court also immediately applied the independent review standard to ensure that a jury finding of actual malice "does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285.

The application of independent review to cases involving actual malice was subsequently reaffirmed in *Bose*, 466 U.S. at 508. The Court articulated the same reasons for the rule that arose in the context of political speech. The Court explained that a jury's application of First Amendment principles "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks . . . ' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Bose*, 466 U.S. at 510 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. at 277 and *New York Times*, 376 U.S. at 270).⁴ As one court has noted, "[t]he evidence is mount-

⁴ This same concern arises in the context of jury awards for punitive damages in defamation cases. Disproportionately large punitive awards are beginning to dominate these cases and demonstrate that damages may be used to punish the media for unpopular viewpoints, not false statements. The case before this Court now is illustrative. The \$195,000 punitive damages award is totally out of proportion to the minimal \$5,000 compensatory award. Nearly 60% of libel damages awards during the period between 1980 and 1984 included an award for punitive damages. See *Libel Def. Resource Center Bull. No. 11*, at 14-15 (Nov. 15, 1984). Punitive damages during that period amounted to 80% of the total damages awarded. *Id.*

Moreover, as Justice Douglas suggested in his dissent in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the influence of emotion

ing that juries do not give adequate attention to limits imposed by the First Amendment and are much more likely than judges to find for the plaintiff in a defamation case." *Ollman v. Evans*, 750 F.2d 970, 1006, 1037 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).⁵

Independent appellate review is demanded to ensure the "precision of regulation" required by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 916. The importance of the First Amendment rights at stake in each individual case justifies independent review. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the threshold that bars the entry of *any judgment* that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511 (emphasis added).

Independent appellate review is also mandated because the application of the actual malice test to factual situations "is the process through which the rule itself evolves and maintains its integrity." *Bose*, 466 U.S. at 503. The importance of this task requires the guidance of appellate courts through independent review of the record.

and prejudice is not confined to the jury. *See also* Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev., 793, 801, 808 (1984) (libel awards may rest in part on "localized judicial distaste for certain publishers" and on judges' "understandable, but constitutionally improper, distaste for the defendant's publication").

⁵ *See Libel Def. Resource Center Bull. No. 21*, at 2, 5 (Oct. 31, 1987); *Libel Def. Resource Center Bull. No. 16*, at 2 (March 15, 1986) (high rate of public official libel plaintiffs prevailing before jury). *See Libel Def. Resource Center Bull. No. 16*, at 2; *see also Libel Def. Resource Center Bull. No. 7*, at 1, 21 (July 15, 1983) (a 1983 study revealed that 41 out of 51 appeals by libel defendants where independent review applied resulted in reversal or modification of the verdict); *Libel Defense Resource Center Bull. No. 23* at Table 3B (Oct. 31, 1988) (a subsequent 1988 study revealed that 35 out of 46 such appeals resulted in reversal or modification).

B. Independent Appellate Review Requires *De Novo* Review of All Relevant Portions of the Factual Record, Not Deferential Review of Presumed Jury Findings and Inferences.

1. Both this Court and Other Appellate Courts Have Reviewed All Record Evidence *De Novo*.

This Court held in *New York Times*, 376 U.S. at 284-86, and reaffirmed in *Bose*, 466 U.S. at 498-511, that appellate courts are required by the First Amendment to conduct an independent, *de novo* review of the entire record when a fact finder determines that a libel defendant has acted with actual malice. This independent review is expressly distinguished from the traditional Rule 52(a) "clearly erroneous" review that grants deference to the findings and inferences of a trial court or jury. *Bose*, 466 U.S. 501, 514.

New York Times defined the scope of such independent review to include all record evidence relating to the jury's finding of actual malice:

[T]he rule is that we "examine for ourselves the statements in issue and circumstances under which they were made . . ." We must "make an independent review of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times, 376 U.S. at 285 (citations omitted).⁶

Many lower courts have not hesitated to apply independent review by examining the record evidence *de novo*. *See, e.g., Koch v. Goldway*, 817 F.2d 507, 508-09 (9th Cir. 1987) (*de novo* review of whether political statement was protected opinion), *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.) *cert. denied*, 476 U.S. 1182 (1986).

⁶ *Bose* reiterated the *New York Times* standard in reviewing the findings of a trial judge, 466 U.S. at 508, and emphasized that independent review means "*de novo* review." *Id.* at n.27.

(*de novo* review of actual malice); *Mr. Chow v. Ste. Jour Azur, S.A.*, 759 F.2d 219, 230 (2d Cir. 1985) (same); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1088-90 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (same); *Brasslett v. Cota*, 761 F.2d 827, 839-40 (1st Cir. 1985) (same); *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987) (same); *cf. Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (en banc), *cert. denied*, 108 S. Ct. 200 (1987) (at a minimum, independent review of an inference of actual malice is "far more rigorous[] than ordinary judgment n.o.v. standard").

Nevertheless, the court below either misunderstood or misconstrued *Bose*.⁷ Yet *Bose* did not create the independent review standard; it had been applied unwaveringly by this Court prior to *Bose*. *Bose* and the long line of precedent that *Bose* expressly relied on⁸ unequivocally hold that independent appellate review means *de novo* review of all relevant portions of the factual record, not deferential review of the jury's findings and inferences.

In *Bose*, the Court reviewed the record evidence to evaluate the trial court's inference of actual malice. 466 U.S. at 493-98, 511-13. The Court noted that the trial judge based his conclusion of actual malice on his disbelief of a defense witness. *Id.* at 512. But the Court determined for itself that the record otherwise contained

⁷ For a discussion of the misapplication of *Bose* by the court below, see Part II.B.2, *infra*.

⁸ In discussing the independent review standard, the *Bose* Court expressly relied on *Roth v. United States*, 354 U.S. 476 (1957); *New York v. Ferber*, 458 U.S. 747 (1982); *Street v. New York*, 394 U.S. 576 (1969); *Hess v. Indiana*, 414 U.S. 105 (1973); *Pennickamp v. Florida*, 328 U.S. 331 (1946); *Miller v. California*, 413 U.S. 15 (1973); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time Inc. v. Pape*, 401 U.S. 265 (1971). See *Bose*, 466 U.S. at 504-511.

insufficient evidence to infer actual malice and held that the trial judge's disbelief of the witness was not clear and convincing proof of actual malice. *Id.*

The *New York Times* Court reviewed the factual record and determined that the Alabama Supreme Court's inference that the *Times* acted with "cavalier ignorance of the falsity of the advertisement" was not warranted. 376 U.S. at 285-86. The Court also concluded that "there was no evidence to impeach the [defense] witness' good faith . . ." *Id.* at 286.⁹

Earlier applications of the independent review standard by this Court in other contexts similarly involved a *de novo* review of the record. For example, in *Norris v. Alabama*, the Court evaluated for itself demographic data and historical facts, weighed contested testimony, rejected the fact finder's inferences drawn from that testimony, 294 U.S. at 590-92, and did not credit what it felt was unpersuasive testimony relied on by the trial court, *id.* at 598.

In *Cox v. Louisiana*, the Court independently analyzed the record testimony, 379 U.S. at 546-48 & n.12, characterized portions of it as "extravagant," *id.* at 546 n.9, viewed for itself a television news film of the event in issue, *id.* at 547, and rejected the trial court's characterization of, and inferences drawn from, that evidence, *id.* at 549-50.¹⁰

⁹ In stark contrast, the court below merely assumed that the defense witnesses' credibility was impeached without any record evidence to support that inference. See notes 13 and 14 and accompanying text, *infra*.

¹⁰ Examples of other First Amendment cases in which the Court similarly reviewed the record *de novo* include *NAACP v. Claiborne Hardware*, 458 U.S. 886 (whether conduct in politically motivated boycott was protected by the First Amendment); *Jenkins v. Georgia*, 418 U.S. 153 (whether material in film was obscene); *Street v. New York*, 394 U.S. 576 (whether conduct and words supported

These cases demonstrate a consistent commitment by this Court to conduct a *de novo* review of the entire record whenever the constitution requires application of the independent review standard.

2. The Court Below Reversed the Bose Standard and Deferred to Presumed Findings Not Found in the Record.

It is not enough for appellate courts to acknowledge their duty to provide an independent review of actual malice, but then to misconstrue that standard and defer to presumed jury findings and inferences found nowhere in the record. The court below claimed that it was "[m]indful of the dictates of *Bose Corp.*," but then proceeded "to determine if the jury's findings were clearly erroneous."¹¹ App. at 4a (emphasis added); see also App. at 19a-20a n.5, 30a, 37a.¹²

But the sum total of the jury's findings on the record consisted only of an affirmative response to three questions asking whether the contested statements were (1) defamatory, (2) false and (3) published with actual malice. App. at 89a. From this slender reed the court

conviction for disparagement of the flag); and *Pennkamp v. Florida*, 328 U.S. 331 (whether two newspaper articles constituted clear and present danger to administration of justice).

¹¹ The court below also made a distinction between "ultimate" findings of actual malice and "subsidiary" facts, stating that independent review applies only to the former. App. at 31a-33a. The *Bose* Court, however, mentioned those two categories of fact only in the context of a discussion of the historical distinction between issues of law, of fact and of mixed law and fact. *Bose*, 466 U.S. at 500 n.16, 501. When the Court addressed whether it should review a finding of actual malice *de novo*, its affirmative answer was based on the constitutional nature of the issue, not on a fact/law distinction. *Id.* at 508. The Court was most clear that independent review requires examination of the "whole record" and the Court, indeed, conducted such a review of both "factual" and "legal" issues. *Id.*

¹² References to the Sixth Circuit's decision are to the Petition.

below manufactured findings and inferences the jury "could have" made concerning (1) the *Journal News*' endorsement of Connaughton's opponent, (2) the *Journal News*' alleged competition with another newspaper that endorsed Connaughton and (3) the *Journal News*' supposed failure to investigate and bias in publishing the article. App. at 35a-36a.

The court below also presumed that the jury "simply did not believe the defendants' [sic] witnesses, its evidentiary presentations or its arguments." App. at 27a-28a. It thus cast the entire jury verdict as turning on a supposed credibility determination by the jury that does not appear in the record.¹³ The court apparently took this conclusion as license to ignore critical aspects of the record including, most significantly, Connaughton's confirmation of the article in a tape-recorded, prepublication interview with the *Journal News*.¹⁴ The court below also frankly admitted its rejection of other critical evidence:

¹³ The Sixth Circuit stated that this entire case was one whose "core issue was simply one of credibility to be attached to the witnesses . . ." App. 27a. This is yet another manufactured "finding" imputed to the jury that nowhere appears in the record. As the dissent pointed out, the factual testimony at trial was largely undisputed. App. at 62a. Thus, it cannot be that the determination of actual malice in this case was simply a matter of witness credibility. Rather, it turned on which facts the jury credited as evidence of actual malice and the inferences it drew from those facts. *Bose* requires appellate courts to review the record independently to see if the facts support a finding of actual malice. The Sixth Circuit simply refused that duty.

Moreover, the assessment of the court below as to credibility is a purely circular argument, to the effect that (1) the jury found for the plaintiff, (2) therefore, the jury must not have believed the defendant and (3) therefore, the finding for the plaintiff is a matter of witness credibility and cannot be disturbed.

¹⁴ In discussing the tape-recorded statements of Connaughton, the Sixth Circuit stated:

The instant case affords the perfect vehicle for reflecting the implementation of . . . Rule 52(a) in assigning deference to a

If the jury had credited the defendants' [sic] evidence, it would have concluded that the *Journal* was not motivated to publish the . . . article by a desire to promote Dolan as its candidate for the Hamilton Municipal Court judgeship by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons. It could have easily concluded that Thompson's charges were true and/or that the *Journal's* conduct in determining Thompson's credibility was not a highly unreasonable departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers.

App. at 28a-29a.

Bose states that appellate courts are "permitted" to give "due regard" to the fact finder's determination of witness credibility. 466 U.S. at 499-500. The court below took this to mean that the jury members are the "ultimate fact finders" on witness credibility, whose inference of actual malice drawn from that determination is apparently beyond review of the appellate courts. App. at 27a.

That conclusion is inconsistent with the record in this case and with decisions of this Court. First, as has been shown, this case does not turn on a jury determination of witness credibility.¹⁵ That was a finding presumed by the Sixth Circuit, not a finding by the jury on the record.

Second, even if the jury had made a credibility determination, the independent review standard requires an

jury's findings of fact The jury refused to believe the theory of the defense and the testimony of its witnesses. The majority, in its decision, has refrained from invading the province of the fact finder by substituting its interpretations of the testimony in evidence of either party.

App. at 19a-20a n.5.

¹⁵ See note 13 and accompanying text, *supra*.

appellate court to examine the whole record and review the inferences drawn from that credibility determination and other evidence to see if together they amount to clear and convincing proof of actual malice. As shown above, that is precisely what this Court did in *Bose* in determining that the trial court's credibility determination did not support a conclusion of actual malice by clear and convincing evidence. *Bose*, 466 U.S. at 511-13; see also *New York Times*, 376 U.S. at 285-86.¹⁶

The phrase "due regard," to have any meaning in the context of *Bose*, must be read in its normal and literal sense. Appellate courts should give whatever regard is "due" to the inferences of actual malice drawn from the jury's credibility determinations (if apparent from the record at all) *in light of* the reviewing court's independent assessment of the entire record. If those inferences are inconsistent with the record evidence, or insufficient to establish actual malice, they should be rejected, just as this Court did in *New York Times* and *Bose*.

III. A CONCLUSION OF ACTUAL MALICE CANNOT BE BASED ON ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

A. The Media's Political Endorsements and Competition in the Marketplace Are Constitutionally Protected Activities, Not Bases for a Finding of Actual Malice.

The court below noted that the *Journal News* had endorsed Connaughton's political rival (Judge Dolan) six years prior to the publication of the challenged article, when Dolan first ran for office, and again two days before the election (*after* the challenged article was published). App. at 5a, 21a. The court also emphasized that another daily newspaper (the *Cincinnati Enquirer*) promoted the candidacy of Connaughton. App. at 15a. From these facts, the Sixth Circuit imputed to the jury the

¹⁶ See notes 8-10 and accompanying text, *supra*.

finding that the *Journal News* "desire[d] to promote Dolan as its candidate . . . by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons." App. at 27a; see also App. at 12a-13a.¹⁷ These two factors, the editorial position of the *Journal News* and its presumed competition with the *Enquirer*, formed the linchpin of the Sixth Circuit's affirmation of the jury's finding of actual malice.¹⁸

When competition of opinions and ideas occurs between members of the media, however, it does not diminish the rule that opinions are protected by the First Amendment. Such competition between members of the media, instead, serves the First Amendment goal of securing "the widest possible dissemination of information from diverse and antagonistic sources." *New York Times*, 376 U.S.

¹⁷ The court stated that the jury "could have concluded" that the *Journal News* was "singularly biased in favor of Dolan and prejudiced against Connaughton" because of the "favorable editorial and daily news coverage received by Dolan from the *Journal* as compared with the equally consistently unfavorable news coverage afforded Connaughton" App. at 35a. The jury also "could have concluded" that the *Journal News* and the *Enquirer* were engaged in a "bitter rivalry . . . for domination of the greater Hamilton circulation market" App. at 35a, "that by discrediting Connaughton, the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area," App. at 35a, and that the *Journal News* sought "to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*," App. at 36a. The Court then deferred to these manufactured "findings" as "not clearly erroneous" and upheld the jury's conclusion that the *Journal News* acted with actual malice.

¹⁸ In developing this theme, which occupied most of the majority opinion, the court failed to examine the challenged language in the allegedly defamatory article or to establish that the *Journal News* published those statements with the requisite subjective awareness that they were false. See, e.g., *New York Times*, 376 U.S. at 271-72; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). For a discussion of the subjective standard imposed by the actual malice rule, see Part III.B, *infra*.

at 266 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Under the First Amendment, the remedy for bad or unpopular opinions is the unfettered opportunity to dissent, not lawsuits to punish those opinions. "The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *New York Times*, 376 U.S. at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.)). "[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and . . . the fitting remedy for evil counsels is good ones [not] . . . coerce[ion] by law—the argument of force in its worst form.'" *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

Unless reversed, the court's deference to a presumed inference of actual malice based on a newspaper's editorial position necessarily will deter members of the media from publishing timely, controversial news stories that relate to a political race on which they have taken a stand.¹⁹ Either they must refrain from reporting on such campaigns or must withhold their endorsements. Either

¹⁹ Opinion, of course, is constitutionally protected from legal attack in a defamation action. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40 (emphasis added); see also *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988) (even outrageous statements of opinion are privileged); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 (1980) ("The best test of truth is the power of thought to get itself accepted in the competition of the market") (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

result is contrary to the role of the press under the First Amendment and produces a presumption of actual malice whenever the press both reports and comments on a political campaign.

Likewise, the speculative assumption that a newspaper's political opinion or reporting may have some commercial value in promoting newspaper sales in no way diminishes the political nature of that commentary or reduces the protection afforded by the First Amendment. In rejecting the notion that a political advertisement in a newspaper was entitled to less protection than other political speech because of its commercial value, this Court stated: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times*, 376 U.S. at 266.²⁰ Also, whether a story is published under competitive pressure to produce hard-hitting investigative reports is irrelevant to a determination of whether a statement was published with serious doubts about its truth. *Tavoulareas*, 817 F.2d at 796-97 & n.50 ("the First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by . . . public figures").

By basing its conclusion of actual malice on a newspaper's desire to increase its circulation, the Sixth Circuit essentially created a dangerous presumption of actual malice whenever a member of the media is a defendant in a defamation action because the media unavoidably operate in a competitive marketplace. Thus,

²⁰ This was reaffirmed in the context of obscenity cases when this Court held that granting any weight to the fact that a publication is sold for profit would "offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S. 463, 474 (1966). See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

the Sixth Circuit's ruling significantly undermines the requirement imposed by *New York Times* that plaintiffs prove actual malice by clear and convincing evidence when a media defendant is named.

Even more troubling, a determination of actual malice based on an endorsement of a particular political candidate operates as a content-based restriction on political speech that in effect violates the First Amendment principle of viewpoint neutrality. *E.g.*, *Boos v. Barry*, 108 S. Ct. 1157 (1988); see also *Bose*, 466 U.S. at 505 (one of the primary goals of independent review by appellate courts is to preserve the "principle of viewpoint neutrality that underlies the First Amendment"); *City of Lakewood v. Plain Dealer Publishing Co.*, 107 S. Ct. 1345 (1988) (a state cannot employ content- or viewpoint-specific criteria in restricting speech). The decision below is content-based because it upholds a finding of actual malice based on the editorial stance of the *Journal News* and its endorsement of a political candidate. Thus, the court below either preserved a content-based penalty on political speech imposed by the jury, or worse, it imposed such a penalty itself by manufacturing a jury finding to that effect and upholding liability on that basis.²¹

The amici respectfully request the Court to exercise its own independent review in this case as part of "the process through which the [actual malice] rule . . . evolves and its integrity is maintained," *Bose*, 466 U.S. at 503, and to establish a rule that actual malice may not be presumed from endorsement of a political candidate, nor may it be presumed from competition between members of the media.

²¹ That penalty was exacerbated by a punitive damages award of \$195,000, which was 39 times the size of the minimal compensatory award.

B. Allegations of Common Law Malice or Failure to Meet Journalistic Standards Are Insufficient to Support a Finding of Actual Malice.

The primary finding the Sixth Circuit imputed to the jury was "that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton." App. at 35a; see also App. at 13a, 15a. But by allowing the *Journal News*' endorsement of Dolan to give rise to an inference of actual malice, the court below confused common law malice with the actual malice requirement of *New York Times*.

The court below also failed to recognize that a political endorsement does not necessarily reflect enmity toward the other candidate; neither does it preclude professionalism in reporting.

[A]n adversarial stance is fully consistent with professional, investigative reporting. It would be sadly ironic for judges in our adversarial system to conclude . . . that the mere taking of an adversarial stance is antithetical to the truthful presentation of the facts. We decline to take such a remarkable step in First Amendment jurisprudence.

Tavoulareas, 817 F.2d at 795.²²

The actual malice rule requires a finding by clear and convincing evidence that the allegedly defamatory words were published with serious doubts about their truth. *E.g.*, *St. Amant*, 390 U.S. at 731. Common law malice,

²² In fact, the *Journal News* was guarded in its endorsement of Dolan and did not attack Connaughton. As it stated in its editorial:

[T]he *Journal News* has taken extra time to examine the candidates, weigh the charges and innuendoes and consider the opinions of those who have worked with both candidates. The findings are inconclusive . . . [A] slight edge goes to Judge James M. Dolan—with the admonition that, if elected, he must assume the responsibility for restoring public confidence in the administration of the court.

J.A. 253, Def. Exh. H.

which includes hatred, spite, ill-will, hostility or deliberate intention to harm, is a constitutionally impermissible basis for establishing actual malice. *Old Dominion No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 281-82 (1974); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 9-11 (1970); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974); see also *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. at 881 (First Amendment prohibits finding actual malice on the basis of "bad motive"). In *Greenbelt Coop. Publishing Ass'n*, a jury finding of liability was reversed as constitutionally deficient because "the jury [was] permitted to find liability merely on the basis of a combination of falsehood and general hostility . . ." and because the general verdict made it "impossible to know . . ." whether the jury imposed liability on a permissible or an impermissible ground." 398 U.S. at 10-11 & nn.2-3.

The Sixth Circuit did not even address the words of the challenged publication in this case. Instead, it focused on an earlier article published by the *Journal News* and the *Journal News*' endorsement of Dolan to establish bias.²³ It is wrong for a fact finder to infer actual malice from common law malice presumed from the challenged speech. It is even worse for such an inference to be based on other editorial speech not even alleged to be defamatory.

The court's assertion that the *Journal News* failed to investigate the accuracy of the alleged defamatory state-

²³ In fact, the court chose to attach as an appendix to its opinion that earlier article rather than the challenged article, and not once quoted the challenged language. App. at 45a-49a. The dissent, however, did attach the challenged article and systematically analyzed each challenged statement in light of Connaughton's prepublication admissions to the *Journal News*. App. at 49a-58a. The dissent concluded that those admissions demanded reversal even under the deferential Rule 52(a) standard of review espoused by the majority. App. at 50a.

ment also is an impermissible basis for inferring actual malice. First, failure to investigate is constitutionally insufficient to establish actual malice by clear and convincing evidence. *St. Amant*, 390 U.S. at 730-33. Second, Connaughton's own prepublication confirmation of the article's challenged statements (a portion of the record the Sixth Circuit failed adequately to consider, see Part II.B.2, *supra*) belies any claim of failure to investigate.

The Sixth Circuit's opinion may also be read as an attempt to resurrect the objective "reasonable publisher" standard once proposed by a plurality of the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (Harlan, J.). That standard was originally suggested only for "public figure" plaintiffs, not "public official" plaintiffs. *Id.* Moreover, a majority of the justices in *Butts* favored the subjective *New York Times* standard for both types of plaintiffs, *id.* at 162, 170, 172-73, and that *New York Times* standard was subsequently reaffirmed by the Court in *Gertz*, 418 U.S. at 335-36.

The court below could point to no constitutionally sufficient evidence to support a finding of actual malice. In fact, Connaughton's prepublication admissions preclude a finding of either actual malice or falsity. Instead, the court's decision amounts to punishment of constitutionally protected expression.

CONCLUSION

This case demonstrates the necessity for both aspects of the *New York Times* rule: procedural protection in the form of independent appellate review and substantive protection to limit the kinds of evidence that can support a conclusion of actual malice. The amici ask the Court to affirm that independent review under *Bose* requires *de novo* review of all record evidence relevant to a finding of actual malice, and at a minimum prohibits deferring to manufactured "findings" favorable to the plaintiff. The amici also ask the Court to establish a rule that a finding of actual malice may not be predicated on a defendant's editorial positions and/or political endorsements, or on competition between members of the media.

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The Associated Press ("AP"), the world's largest news gathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York. AP engages in gathering and distribution of news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

Cable News Network, Inc. provides the nation with two 24-hour television news services, CNN and Headline News. Its news and information programming reaches more than 48 million households in the United States. Its programming is also carried in 65 other countries.

Capital Cities/ABC, Inc., through subsidiaries, owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers, magazines, and books.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The Cincinnati Enquirer is a daily newspaper published in Cincinnati, Ohio as a division of Gannett Satellite Information Network, Inc., with daily circulation of 194,804 and Sunday circulation of 328,378.

The Chronicle Publishing Co. publishes the *San Francisco Chronicle* with a daily circulation of 565,000 and a Sunday circulation of 730,000. The Chronicle Broadcasting Company, a division of Chronicle Publishing Company, also operates three television stations.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, *The Dow Jones News Service*, and a number of other publications. Through its Ottaway Newspapers, Inc. subsidiary it publishes newspapers in 23 communities in 13 states across the nation.

Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston which has the largest circulation in New England, with a daily circulation of approximately 500,000 and a Sunday circulation of approximately 800,000.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications. It publishes nationally distributed magazines, newspapers and hard-cover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

Miami Herald Publishing Company is an unincorporated division of Knight-Ridder, Inc., which publishes the *Miami Herald*, a newspaper of daily circulation throughout south Florida.

National Broadcasting Company, Inc. owns and operates a national television network, and itself and through subsidiaries operates television stations, all of which are engaged in the gathering and dissemination of news to the public.

National Public Radio is a non-profit membership organization providing news and information and cultural programming including Morning Edition and All Things Considered to over 350 member stations.

The New York Times Company publishes numerous magazines and newspapers, including *The New York Times*, a daily newspaper with nationwide circulation, and some 35 regional newspapers; it also owns radio and television properties. *The New York Times* has a daily

circulation of 1.1 million and a Sunday circulation of over 1.6 million.

The Philadelphia Inquirer is a newspaper published daily by Philadelphia Newspapers, Inc. in Philadelphia, Pennsylvania, with a daily circulation of 502,507 and a Sunday circulation of 989,026 in the greater Philadelphia metropolitan area.

Seattle Times Company publishes *The Seattle Times*, the largest total daily and Sunday circulation newspaper in the Pacific Northwest, and also publishes the *Walla Walla Union-Bulletin*.

Time Inc. is the largest publisher of general circulation magazines in the United States. It publishes and distributes *Time* magazine, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and, through its subsidiary, Southern Progress Corporation, also publishes *Southern Living* and *Southern Accent* magazines. *Time* magazine alone has a domestic circulation of 4.3 million.

The Times Mirror Company publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1,137,000 daily and more than 1.4 million on Sunday. Times Mirror also publishes seven other newspapers including *Newsday*, the *Baltimore Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News*, *Virginia Daily Press* and *The Times-Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

The American Civil Liberties Union is a nationwide, non-partisan, membership organization dedicated to de-

fending the principles embodied in the Bill of Rights. Since its founding nearly 70 years ago, the ACLU has been particularly concerned with government action—whether administrative, legislative, or judicial—that restricts the free flow of information contemplated by the First Amendment. Accordingly, the ACLU has participated in many of this Court's major First Amendment cases and has supported the effort, begun in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to place constitutional limits on the common law of libel.

The American Newspaper Publishers Association ("ANPA") is a national trade association representing over 1,400 newspapers located primarily in the United States and Canada. Its membership constitutes approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors is a nationwide professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include the ongoing responsibility to improve the manner in which the journalism profession carries out its obligations to providing an unfettered and effective press in the service of the American people.

The Association of American Editorial Cartoonists ("AAEC") is a non-profit organization of over 300 professional editorial cartoonists in the United States, Canada and Mexico. Founded in 1957 by John Stampone, editorial cartoonist for the *Army Times*, AAEC's purpose is to promote and stimulate public interest in the editorial cartooning profession, defend the rights of cartoonists, sponsor exhibitions and help aspiring cartoonists.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association

comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcasting networks. NAB's members cover, produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The National Conference of Editorial Writers is a nationwide professional association of editorial writers representing about 400 daily newspapers, organized to advance professionalism in, and to encourage the free expression of, editorial opinion. The Conference has a particular interest in protecting editorial expression on the political process.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885 and with more than 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For over a century, a prime concern of NNA has been to ensure that political debate in this country be conducted in an open and robust manner.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. NA has a long-standing commitment to the free exchange of information and opinion through the written word as protected by the First Amendment.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.